(26,605)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 519.

PANAMA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH T. TOPPIN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Page
Caption	*a*
Transcript of record from the district court of the United States for Canal Zone	
Caption	1
Complaint	1
Appearance for defendant	2
Demurrer	4
Order taking demurrer under advisement, etc	5
Order overruling demurrer	6
Answer	6
Exhibit "A"—Opinion *in re* Ramirez *vs.* Panama Railroad Co.	6
"B"—Law No. 37 of 1904	9
"C"—Opinion *in re* Restrepo *vs.* Sabana Railway Co.	29
Submission of demurrer to answer	31
Orders allowing plaintiff delays in which to amend complaint	41
Amended complaint	42
Demurrer to amended complaint	43
	46

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 2, 1918.

Page

Order overruling demurrer to amended complaint, and exception thereto 47
Answer to amended complaint 47
Demand for trial by jury and order granting same 49
Motion of defendant for order to require plaintiff to submit to physical examination 50
Order for physical examination 52
Motion of plaintiff for leave to amend amended complaint 53
Hearing in part, order overruling motion to amend, and orders on motions for inspections 54
Motion for optical inspection of scene of accident 55
Motion for stereopticon inspection of X-ray photographs 57
Further hearing and verdict for plaintiff 59
Motion of defendant for new trial 59
Order continuing time for argument on motion for new trial 65
Submission of motion for new trial 66
Judgment and order overruling motion for new trial 66
Opinion of the court on motion for new trial 67
Bill of exceptions 73
Testimony of George Peters 73
S. Farrell 75
Charles Downes 77
J. Pellage 79
Joseph T. Toppin 82
S. W. Heald 91
Dr. S. G. Taylor 94
Dr. F. S. Mebane 109
Mr. Ohlsen 111
S. Bettelheim 114
Martin B. Connolly 115
Thomas W. Moorfoot 118
Thomas Hines 120
Hubert Ellis 121
C. Stamp 126
George Curtis 127
Joseph T. Toppin 129
S. Farrell 130
Frederick Leacock 130
Samuel Phipps 130
Motion of defendant for peremptory instructions to jury and exception to order overruling same 131
Charge of the court 132
Exceptions of defendant to charge of court 140
Further instructions to jury 144
Verdict 145
Motion for new trial, order overruling same, and exception thereto 145
Order approving bill of exceptions 147
Petition for writ of error and supersedeas 148
Assignment of errors 149
Bond on writ of error 153

Page

Writ of error (omitted from printed record).
Citation (omitted from printed record).
Clerk's certificate 156
Order of argument and submission 157
Opinion, Walker, J. 157
Judgment 159
Petition for writ of error 160
Order allowing writ of error 161
Assignments of error 161
Bond on writ of error 164
Clerk's certificate 165
Writ of error 166
Certificate of judgment 166
Citation and service 167

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Wednesday, November 21st, A. D. 1918, at New Orleans, Louisiana, before the Honorable Richard W. Walker and the Honorable Robert L. Batts, Circuit Judges, and the Honorable Rufus E. Foster, District Judge.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

versus

JOSEPH T. TOPPIN, Defendant in Error.

Be it remembered that heretofore, to-wit, on the 17th day of January, A. D. 1918, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the Canal Zone, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as Number 3203, as follows:—

(*a*)

TRANSCRIPT OF RECORD.

No. 96 Civil.

JOSEPH T. TOPPIN,

Plaintiff,

versus

THE PANAMA RAILROAD COMPANY, A CORPORATION,

Defendant.

W. C. Todd, William C. MacIntyre, Attorneys for Plaintiff.

Frank Feuille, Walter F. Van Dame, Attorneys for Defendant.

APPEALED.

July 14, 1917.

In the District Court of the Canal Zone, Cristobal Division.

United Sates of America, Canal Zone, ss.
District Court, Cristobal Division.

Pleas before the Honorable William H. Jackson, Judge of the District Court of the Canal Zone, at a term thereof begun and holden in the Court House of said Division, on the 3rd day of July, 1915, being one of the days of the June term of Court, in the year of Our Lord one thousand nine hundred and fifteen.

Present: Honorable William H. Jackson, Judge. Honorable Charles R. Williams, District Attorney; Mr. William H. May Marshal.

Attest: W. B. Cheatham, Asst. Clerk.

COMPLAINT.

United States of America, ss.
Panama Canal.

In the District Court for the Canal Zone, Cristobal Division.

Joseph T. Toppin, Plaintiff,
vs. No. 96. Civil.
The Panama Railroad Company, a Corporation, Defendant.

Complaint.

Comes now the plaintiff in the above-entitled cause, by William C. Todd and William C. MacIntyre, his attorneys, and complaining of the defendant herein he says and alleges as follows, towit:

I. That defendant is a corporation, organized and doing business under the laws of the State of New York, U. S. A., and doing business and owning property, real, personal and mixed within the Canal Zone, and having its officers and maintaining offices within the Canal Zone, Isthmus of Panama, and is within the jurisdiction of this Honorable Court.

II. That plaintiff is a resident of the city of Colon, R. de P., and has brought himself within the jurisdiction of this Honorable Court.

2 III. That Defendant Company is a railroad company, and, along with its other business, it owns and operates a railroad track along Broadway, in the City of Colon, R. de P.

IV. That on the fourth day of July, 1914, plaintiff was riding a stallion, the property of one T. A. Green, along Broadway, in the City of Colon, R. de P. and while

riding said stallion, or horse, at or near the corner of Ninth St. and Broadway, Colon, said stallion or horse suddenly became unmanageable, and bolted and swerved and attempted to cross Broadway at the Ninth Street Crossing and go its stable, on the east side of Broadway, near Ninth St. That plaintiff was using all due care and diligence, and was doing everything within his power to control said stallion and to direct him along Broadway toward Eighth Street.

IV. That at said time and place, the defendant corporation, by its servants, agents and employees, was operating a railroad locomotive on its said tracks on Broadway, in the City of Colon, R. de P., said Broadway being a public street and thoroughfare in said City of Colon. And defendant company was operating said locomotive at a careless and reckless and unlawful rate of speed, towit, from 16 to 20 miles per hour, and at the public street crossing at ninth Street, defendant corporation was carelessly, recklessly, dangerously, negligently and unlawfully failing to provide any protection whatsoever, and said locomotive was operating without ringing any bell or sounding any whistle or warning. And when said stallion, upon which plaintiff was riding, as aforesaid, got upon said railroad crossing, the locomotive of said defendant company did run into and against the plaintiff, and did kill the horse upon which plaintiff was riding, and did throw plaintiff violently to the ground and did inflict grave and serious bodily injuries and sprains, particularly in the region of his left hip, and on account of said injuries, bruises, and sprains, plaintiff suffered and is still suffering great and severe bodily pain and intense mental pain and anguish, and on account thereof plaintiff was compelled to expend for medical attendance two hundred dollars, U. S. Cy., and plaintiff was incapacitated from performing his work from July 4th, 1914, until the present time, and the injuries received by plaintiff on account of the negligence of defendant, as aforesaid, are of a permanent nature, and plaintiff will ever suffer the

3

effects of said injuries so received. That all of said damage and injury which plaintiff has sustained and is still sustaining is wholly due to the negligence and carelessness of defendant company, and plaintiff was wholly without fault or blame in the premises.

Wherefore, plaintiff has been damaged by defendant company to the sum of $15,000.00 U. S. Cy., together with all his lawful costs herein expended and incurred.

Filed this 3rd day of July, 1915.
(sgd.) W. C. TODD,
(sgd.) WM. C. MACINTYRE,
Attorneys for Plaintiff.

Indorsed: Filed July 3rd, 1915.

* * * * * * * * * * * * * * *

---

4 DEFENDANT'S APPEARANCE.

Filed July 24, 1915.

United States of America, Canal Zone.

In the District Court for the Canal Zone, Division of Cristobal.

Joseph T. Toppin, Plaintiff,
vs. Civil 96.
The Panama Railroad Company, a Corporation, Defendant
Defendant's Appearance.

Comes now the defendant in the above entitled cause, by its undersigned attorneys, and hereby enters its appearance.

THE PANAMA RAILROAD COMPANY,
a corporation,
by (sgd) FRANK FEUILLE, Counsel.
(sgd.) W. F. VANDAME, Assistant Counsel.

5 DEMURRER.

Filed August 4, 1915.

United States of America, Canal Zone.

In the District Court for the Canal Zone, Division of Cristobal.

Joseph T. Toppin, Plaintiff,
vs. Civil No. 96.
The Panama Railroad Company, Defendant.

Demurrer.

Comes now the defendant company in the above entitled cause, by counsel, and demurs to plaintiff's complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action.

THE PANAMA RAILROAD COMPANY,
a corporation,
by (sgd) FRANK FEUILLE, Counsel.
(sgd) WALTER F. VANDAME, Assistant Counsel.

MINUTES OF AUGUST 18th, 1915.

Joseph T. Toppin
vs.
Panama Railroad Company.

This day this case was set for September 11th, 1915, for hearing on demurrer.

MINUTES OF SEPTEMBER 11th, 1915.

Joseph T. Toppin,
T. A. Green,
vs.
Panama Railroad Co.

This day these cases are consolidated for the purposes of argument on demurrers filed, and hearing being had on said demurrers same are taken under advisement.

---

6 MINUTES OF OCTOBER 6th, 1915.

Joseph T. Toppin,
vs.
Panama Railroad Co.

This day the Court renders its oral opinion overruling the demurrer hereinbefore filed and argued and the exception of defendant is noted thereto. Defendant is given until the 13th to answer.

ANSWER.

United States of America.

In the District Court of the Canal Zone, Cristobal Division.

Joseph T. Toppin, Plaintiff,
vs. No. 96 Civil.
The Panama Railroad Company, a Corporation, Defendant.

Answer.

Now come Frank Feuille and Walter F. Van Dame, Attorneys for the Panama Railroad Company, Defendant,

and deny all and singular the allegations of Plaintiff's complaint and demand strict proof thereof, and for further answer herein, the defendant says that the alleged injury complained of by plaintiff occurred in the City of Colon in the Republic of Panama and in consequence the laws of that Republic, and not those of the Canal Zone are applicable for this case.

Defendant would further represent to the Court that Articles 2347 and 2349 of the Civil Code of Panama, as construed by the Superior Court of Panama, are applicable to this case; that said articles 2347 and 2349, read as follows:

"Art. 2347. Every person is liable not only for his own acts for the purpose of the indemnity of damage, but also for the acts of those who may be under his care.

Thus, the father, and in the absence of the latter, the mother is responsible for the act of the minor children living in the same house.

Thus, the tutor or cuarator is responsible for the conduct of the ward who lives under his dependency and care.

Thus, the husband is responsible for the con-
7 duct of his wife.

Thus, the directors of colleges and schools answer for the acts of their pupils while they are under their care, and artisans and contractors, for the acts of their apprentices or dependents, in the same case.

But the liability of such persons shall cease, if with the authority and the care which their respective quality confers upon them and prescribes, they should not have been able to prevent the act.

Art. 2349. Masters shall be responsible for the damage caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and the competent authority; in such case all responsi-

bility for the damage shall fall upon said domestics or servants."

That the two articles above quoted from the Civil Code were construed by the Superior Court of Panama on January 28, 1886, in the case of Felipe Ramirez, by Isidoro Burgos, his attorney, Plaintiff, vs. the Panama Railroad Company, Defendant, wherein the Court held that under the provisions of said Articles 2347 and 2349, the railroad company was not responsible for the torts of its servants and employees arising ex delictu, a copy of which decision is attached hereto and made a part hereof, and marked Exhibit "A".

The defendant further alleges that the Police Cide if the Republic of Panama, known as Ordinance No. 87, of the year 1896, enacted by the Assembly of the Department of Panama and re-enacted by the Convention of the Republic of Panama, on May 4, 1904, is also applicable to this case, and that the said law of the Assembly of Panama of May 4, 1904, is known as Law 37, and a copy of the same is hereto attached and made a part hereof, marked Exhibit "B"; and that Articles 488 and 489 of said Police Law of Panama read as follows:

"Article 488. When a tramway crosses a town, as well as when it passes by a gate or viaduct, it shall not travel faster than the speed of a wagon drawn by horses at a moderate trot; in case of an infraction the conductor or administrator of the enterprise subsidiarily shall pay a fine of ten to one hundred pesos, without prejudice to the responsibility, civil or penal to which he may be subject by reason of the damage, fault or delict.

Article 489. The tramway, when passing places where there are or may be a gathering of persons,
8 shall call their attention from afar, and continue to call attention of the transient persons, by means of a whistle, bell, horn, or other adequate instrument. Every infraction of this privision shall be punished with a fine of from five to one hundred pesos; but if the omission should occasion damage or prejudice to a third,

the procedure provided for in the preceding article shall be followed.

This article and the previous article shall be applied to railroads when they enter cities or towns."

The defendant further alleges that under and by virtue of the said laws of Panama, and the Republic of Colombia, of which Panama formed part before its separation, a corporation cannot be held responsible for the criminal acts of its agents, which principle of law was announced by the Supreme Court of Bogota, on the 19th day of July, 1892, in the case of Ruperto Estrepo vs. The Sebana Railway Company (La Compania del Ferrocarril de la Sabana) published in the Judicial Gazette of Bogota, Volume I, page 170, copy of which opinion is hereto attached, made a part and marked Exhibit "C".

The premises considered the defendant prays that upon a trial hereof to have its judgment against plaintiff and the costs of suit and for all other and further relief, general and special.

Respectfully,
(Sgd.) FRANK FEUILLE,
(Sgd.) WALTER F. VAN DAME,
Attorneys for Defendant.

EXHIBIT "A".

Felipe Ramirez, Isidoro Burgos, his attorney, plaintiff,
vs.
The Panama Railroad Company, Defendant.

Translation of a Certified Copy of the Decision of the Superior Tribunal of Panama, January 28, 1886, and Translation of the Decision of the Supreme Court of Justice of Colombia, at Bogota, March 31, 1887, published in the "Gaceta Judicial", Vol. I, p. 170: Year 1, No. 22, Bogota, June 10, 1887.

(Translation)

Superior Court of Justice, Panama,
January 28th, 1886.

Submitted: That the First Civil Judge of this Province pronounced a condemnatory verdict against the
9 Panama Railroad Company on the 28th day of July of the year last past, in the suit against said company instituted by Mr. Felipe Ramirez through his general attorney, Mr. Isidore Burgos. From this sentence both parties have appealed, wherefore this Superior Tribunal is about to take up the case in order to pronounce a fitting sentence.

(1) The plaintiff in his complaint expresses himself thus: "I formally demand of the Panama Railroad Company the sum of sixty thousand pesos ($60,000) in which sum my principle, according to the instructions I have received from him estimates the permanent injuries and damages caused him by being thrown from a coach of the Panama Railroad Company, by Mr. C. Smith, the conductor of the said coach."

The complaint was allowed to be filed, notice issued, and proceedings followed their legal course until they reached a stage where the parties could plead in accordance with what was claimed and proved. This was done and the judge pronounced the sentence on the day named, its resolving part being summarized in the three following paragraphs:

A. That the facts on which is based the present complaint of Felipe Ramirez against the Panama Railroad Company for damages and injuries sustained by reason of being thrown violently from a coach of the said company on the 7th day of February of the present year, by the conductor, C. Smith, are proved.

B. That the right of Felipe Ramirez to demand indemnity of the Panama Railroad Company is proved, and

C. That the said Panama Railroad Company is condemned to pay to Felipe Ramirez the damages legally appraised, with costs at the charge of the said company.

(II.) That the demanding part of the written pleading, read at the hearing on the 23rd of December last past, is as follows: "I only ask that there be cleared up in the sentence one point which may appear doubtful, and which obliges me to appeal from the sentence in order to avoid new and irritating suits with the Panama Railroad Company. I ask that the sum which this company is condemned to pay to my principal be fixed.

From what is quoted in the foregoing paragraph it is clearly seen that the appeal interposed by the plaintiff limits itself to asking that the sum which the railroad company is condemned to pay to Felipe Ramirez be fixed and that he agrees with the other part of the sentence.

The attorney for the railroad company also appeals in his turn, and makes his appeal cover all of points two to three of the resolving part of the sentence which is to be reviewed.

The record having reached the Court for that purpose the attorney for the Panama Railroad Company urged a prior and special plea of nullity on account of the disqualification of the attorney of Felipe Ramirez, and for lack of jurisdiction. The first was based on article 53 of the Compilacion of 1880, that among other public employees, soldiers in active service can not act as attorneys on account of their employment—the attorney for Mr. Felipe Ramirez, Mr. Isidoro Burgos, being reputed as such who at the time was discharging the functions of Judge Advocate, with the rank of Lieutenant Colonel of the National forces quartered in this place.

And the second cause of nullity was based on the lack of jurisdiction in the civil judge before whom the action was presented, filed, and prosecuted until sentence was pronounced. He who urged this objection, as a basis therefor expressed himself thus: "I have alleged nullity for lack of jurisdiction because the controversy, in my opinion, ought to be tried before a commercial jurisdiction or before the National Tribunals."

10 The legal course being given to the proceedings the Court thought proper to resolve the point on the 9th of September, in the following manner:

"First Point. Disqualification of the plaintiff's attorney. — ' Doctor Burgos is not, therefore included in the prohibition of article 53 of the Compilacion of 1880.'

Second Point. Lack of Jurisdiction.—' The proceeding urged by the attorney for the company is declared unfounded."

As this second point, although the matter has been resolved and filed in the archives of the Secretary of this Tribunal, is still a matter of discussion in a certain essential part of the brief which the attorney for the company has submitted for final consideration, it will be well to reproduce in this judgment the principal reasons which influenced the Court in its decisions:

Matters of commerce are those which have their origin in a mercantile operation, and the damages and injuries arising out of a criminal act are outside the scope of any contract whatever.

Because a transportation enterprise resembles a mercantile enterprise it should not be deduced that all of its acts are of a commercial nature. The loss of a member or the life of an individual, losses which cannot be estimated, are for that reason beyond exact computation, it being necessary to appraise them with regard to various circumstances. None of these circumstances can have the least relation to commercial affairs, but they are directly submitted to the general substantive laws, which proceedings is indicated by the Judicial Code, and the cognizance of which is within the exclusive jurisdiction of the civil judge.

Crimes are never in any case matters of commerce.

Article 1487 of the Judicial Code says:

Civil actions which directly or indirectly grow out of a crime or fault are instituted separately from the criminal action, before judges qualified in civil affairs, according to the requirements of books 1 and 2 of this code.

Indemnity which commercial enterprises have to pay for damages and injuries arising out of crimes has no place in affairs of commerce.

Indemnity growing out of a crime or fault is not, therefore, a commercial matter. Neither is a passengar against whom a crime is committed a person who pertains to the criminal jurisdiction.

III. The incident being concluded, the proceeding following its regular course until a stage was reached where the final statements of the parties could be hea[r] [heard] which took place at the hearing of the 23d of December last and the 3d of January of this present year.

The debate has been maintained with intense interest by both parties. The points of law submitted to this Superior Court have been examined with such searching pertinacity that, by reason of their unusualness, by reason of their connection with the different jurisdictional branches into which the legislation of the Republic is divided, by reason of the confusion to which this has given rise, they have demanded a long and temperate study, as well on account of the unavoidable duty of "giving to each one his, right," and because of the proper adjudication of the present interests involved will have a more important bearing in the future.

The sum of sixty thousand pesos which Mr. Ramirez claims through his attorney, Mr. Isidoro Burgos, for damages and injuries received, would not compensate, even in a small degree the physical and mental sufferings of the injured party. His misfortune is lamentable, form though it may not be permanent, as may be deduced from the prognosis of the physician, Dr. Jorge E. Delgado, there are mental sufferings, which tough not tangible, yet we can all appreciate, principally when they do not affect us personally.

11

This action also involves the family of Ramirez, with their feelings and suffering—but law is justice and it is necessary so to apply it as to give to each one what the law allows.

This is not, however, the first time that an action to recover damages and injuries has been instituted against chartered common carriers in the Republic. The General Transatlantic Company has been the subject of claims of this kind before the tribunals of the extinct state of Bolivar, if not for damages to the person, yet for those to property. The novelty of this claim urged today consists in the meaning and application of the legal provisions which it is sought to make effective.

IV. Hence, it is considered (1st) that the principal points which ought to be embodied in this sentence are: A. The act on which the claim is based. B. If it gives the right to recover damages and injuries, and C. To whom the charge is imputable. (2d) That these three points are the same that the judge of the first instance set out, and the same from which the parties respectively appealed. (3rd) It is a fact, and is proved that Felipe Ramirez has suffered injuries which, as the physicians Doctors Quijano, Wallis, Manuel Antonio Mora, and Jose Maria Lambana state will render him an invalid for life. (4th) That Dr. Jorge E. Delgado, in his prognosis does not affirm this but says that owing to the age and ill health of the injured person it is possible that he will be permanently crippled. (5th) That the injury was caused by C. Smith, and as the manner in which the act took place has so often been referred tom [to] the Court, recurring to what appears in the record in this respect also affirms that Smith committed the offense of which he is accused, which is a crime included in one of the sections of article 2, chapter 3, title 1, book 3, of the Penal Code.

However, it is not thought that Smith should be declared responsible in these proceedings for the criminal act out of which grew the attempt of the 7th of February against the person of Felipe Ramirez, inasmuch as criminal matters have their own special procedure and jurisdiction which may not be encroached on with impunity. The estimate here made of the act and the responsibility therefor is purely to establish a starting point from which a

conclusion may be drawn as to who is responsible for the damages claimed by Mr. Felipe Ramirez, through his attorney Mr. Isidoro Burgos. (6th) The act on which the claim is based gives the right to recover damages. See article 74 of the Penal Code, which provides as follows:

Article 74. In every crime from which there may result damages and injuries against the public treasury or against individuals, the authors and abettors should be jointly condemned to make good the resu ting damages, without prejudice to holding one to a greater responsibility than another, according to their resources and cuplability.

Article 76 Id. next herein quoted, covers the case.

12 Article 76. In case of wounds or maltreatment which incapacitate one for work, the offended party will recover from those responsible, according to their resources and culpability, the means of subsistance and cure during the resulting illness, whenever the injured party derives the principal subsistence of himself and his family from his personal labor so interrupted.

(7) The right of Felipe Ramirez is undoubted, clear, and evident, that in the application of the articles just quoted he be declared by the competent authority having jurisdiction of the subject, duly entitled to compensation for the wrongs and injuries resulting to him from the crime which permanently incapacitated him from work.

V. (8) As the damages and injuries sought to be made good arise from a crime, it is indispensable to take account the provisions applicable to a criminal act whose consequences are injurious, in order to determine the right which is claimed.

Speaking generally article 1486 of the Judicial Code provides that a civil action for the recovery of damages for a crime or fault, which ought to conform to the requirements of book 3, cannot be instituted until the crim-

inal prosecution is concluded with a condemnatory sentence and before a judge competent to try a civil case. The fact which gives Mr. Ramirez the right to claim damages and injuries has to be first tried and decided by the proper authority (the jury) for a crime is dealt with which merits the penalty of banishment or imprisonment. In this connection it is necessary to distinguish that damages and injuries arising from crimes committed on the property of another, and damages and injuries caused by crimes against persons are being treated of. In the first case the civil action may be instituted even without waiting for the termination of the criminal trial. In the second case it is absolutely necessary await the termination of the said criminal trial, in order that the sentence pronounced by the judge of criminal jurisdiction, being condemnatory and in accord with the verdict of the jury, the damages and injuries may be appraised and reclaimed.

Article 1487 corroborates these statements when it says: "The other civil actions which direct or indirectly grow out of a crime or fault will be instituted separately from the criminal, etc." What are these other civil actions? (That is to say those which require a private prosecution—Translator's note.) Those which arise by reason of the damages mentioned in the second sentence of article 1483 of the Judicial Code with reference to those indicated in articles 514 and 519 of the Penal Code, and finally those recently introduced by Article 137 of the compliacion of 1880, which defines the case, or when a crime or fault is committed against property.

VI. (9th) It makes no difference that the act may be notorious, it makes no difference that public opinion recognizes it, it makes no difference that the influence of notoriety, the influence of opinion is felt in the minds of the authorities, it is none the less necessary to submit to the written law. This provides by the 18th clause of article 17 of the Constitution of the extinct State of Panama, in force on the 7th day of February, 1886, that, trial by jury as established by law, etc. in criminal matters, "is an indi-

vidual right, recognized, and guaranteed to every individual of the human race found in our territory." The las has established that in the case of crimes which merit the penalty of banishment or imprisonment there is no right to recover for the damages or injuries inflicted on the persons until the guilty ones are ascertained and adjudged responsible for the crimes by competent authority. Indemnity for damages and injuries is a necessary consequence of a sentence so pronounced. The personal responsibility can not be extended to another of whom the offender does not depend. This doctrine is particularized in article 11 of the Penal Code and must be accepted.

Article 11. The responsibility which carries with it a penalty is purely personal and can never be extended to those who are not culpable.

According to the article it is indispensable that the declaration of culpability be first made by the
13 authority having jurisdiction of the criminal branch in order to maintain against the culprit an action for the damages and injuries occasioned, and always under the restriction indicated in article 14, id., the second part of which reads thus: "For the purpose of restitution and indemnity the provisions of chapter 3 of title 3 shall be applied," etc. Article 76, which we have already copied, is included in this title and chapter. It is also found in articles 79 and 81 inclusive, whose doctrine is this set out: "All matters relating to indemnity for damages and injuries will be tried in a civil action (article 79) and as it is seen that the right to indemnity for damages and injuries ought to be first recognized and determined by a sentence pronounced in a criminal action, in which the party responsible for the crime has been heard and convicted, which has not yet taken place, it is clear and evident that the claim which has been instituted is untimely.

(10th) Article 80 confirms what has been said in this analysis.

Article 80. If the convict, or the persons who ought to respond for him have not sufficient goods to pay the whole of the pecuniary "condemnation" the value of what they have will be applied in the following manner. 1st. To repay the value of the good which has been supplied them. Referring to the first clause of Article 1046—Administrative.) 2d. To the compensation for damages and injuries to those who have suffered them. 3d. To the payment of fines.

As there are no useless words in the law it is necessary to determine the legal signification of the words "convict" (reo) and condemnation (condenacion) which are there use. "Reo" (convict) juridically speaking, in criminal law, refers to him only who is or has been condemned, and it could not be otherwise since it is based on the general principles of legislation.

(11th) If one examines book 3 of said code, which treats of the institution and prosecution of criminal trials (criminal procedure) it will be seen that the following gradation, with reference to those responsible for criminal acts, is preserved from the first to the last of its articles: At the preliminary hearing—"accused of crime", "suspected," "held for trial", or other words whose meaning does not encroach on any other phase of the trial. On trial— "presumptive criminal," "indicted," or others of that style until sentence is pronounced. Once sentence is pronounced the prisoner is termed a "convict," (reo), and to give more force to the words he is called a sentenced defendant or confirmed criminal.

As is seen the phrase which is used in the article under examination, "to pay the whole of the pecuniary condemnation" could not refer to anything except the goods of one who has been condemned (condenado) in the criminal action; to the goods of the persons who ought to respond for others, in order to pau with their own goods what may be lacking of the goods of the former, so as to make up the total of the peciniary condemnation.

(12th) The doctrine treated of is confirmed by article 81 which reads thus:

The pecuniary responsibility growing out of criminal acts executed by minor children, pupils, servants, and in short, by persons who depend upon others will be made effective out of the private goods of such persons, without the persons from whom they depend being held to a greater responsibility than the civil and subsidiary one in the respective cases and in conformity with law.

Supposing that one of those persons depending on other be condemned in conformity with the law, the pecuniary condemnation must be paid from the goods which he may have, in the order specified in article 80; and if they should fall short of the value of the whole condemnation, then, subsidiarily, that is to say secondarily, in order to make good the deficiency in whole or in part it will be paid out of the goods of the persons on whom they depend; so that if the goods of the pupil, the minor child, or
14 the servant who has been condemned, etc., suffice only to pay what is specified in the first clause of article 80, then the value of the remainder, specified in the other two clauses will be paid from the goods of those on whom they depend. It is thus demonstrated that it is necessary above everything, that in cases such as the present the condemnatory verdict in the criminal action must first be pronounced, in order that indemnity for damages and injuries may be demanded and made effective out of the goods of the persons on whom depend those, who being such dependents of others, may be condemned to reparation, etc., and having analyzed up to this point the first two points of the sentence appealed from, we now proceed to take up the final and fundamental objective of the question:

VII. To whom is the charge imputable? (13th) It appears that C. Smith, an employee of the Panama Railroad Company was employed by the said company on the 7th day of February, 1886, to casually lend his services

as conductor on the train. Before going further it should be established, although it appears to involve a contradiction, that the Panama Railroad is and ought to be considered a chartered public carrier, and as such its obligations are contained in the three chapters of title 5, book 2 of the Code of Commerce. For this reason, and the counsel engaged in the suit having handled the question in the field of commercial jurisprudence, the Court, following the course of the debate, proceeds to quote the provisions of that jurisprudence pertinent to clear up the debated point.

Article 258 of the Code of Commerce defines transportation in this manner.

Article 258. Transportation is a contract by virtue of which one obliges himself, for a certain price, to transport from one place to another by land, canals, lakes or navigable rivers, passengers, or the merchandise of others, and to deliver the same to the persons to whom they may be consigned.

Article 262 determines the persons who may celebrate this contract:

Article 262. Persons who have to capacity to obligate themselves may celebrate this contract.

Article 263 sets out the manner in which the transportation contract may be perfected:

Article 263: The transportation contract is perfected by the consent alone, express or implied, of the parties.

(14) It is necessary to take into account other provisions of the same title in order to make clear who is responsible for the damages and injuries claimed by the attorney for Felipe Ramirez. Articles 319, 320 and 321 will contribute to this end:

Article 319. The contract for transportation is understood to determine the conditions of price, time of transit, and days of arrival, etc.

Article 330. The tickets for seats or compartments establish the contract when they refer to the transportation of persons, etc.

Article 321. The conductors of vehicles or stables, station agents, and the masters of vessels, may receive passengers and freight during the journey and obligate the empresairos to comply with the obligations thus imposed on the carrier.

(15) From these legal provisions, which have been established as premises, it is deduced: That the obligations of transportation enterprises emanate from a biliteral contract; that the contract may be celebrated by persons having the legal capacity to obligate themselves; that the contract is perfected by the consent alone, express or implied, of the parties; that the tickets for seats establish the contract when they refer to persons, and that the conductor of vehicles, etc., may celebrate these contracts during the journey.

If therefore all this is true, Conductor C. Smith on the 7th day of February was one of the persons reputed by the law to have the capacity to obligate himself, a person suit juris, a person responsible for his actions; a legal person.

VIII. (16th) For the completion of this demonstration we complement it with the fourth clause of article 322 of the Code of Commerce. The article reads thus:

The empresarios (of transportation) are obliged,—(4th) to indemnify passengers for the damages they may suffer in their persons through defect of the vehicles; through their fault; through that of the conductors or postillions.

We will complete this demonstration by separating the sentence as has been suggested in the debate, into the periods which its construction permits. 1st. To indemnify passengers for the damages which they may suffer in their persons by reason of the defects of the vehicle. 2d. To indemnify passengers for the damages which they

may suffer in their persons through their (the empresarios) fault, 3. To indemnify passengers for the damages they may suffer in their persons through the fault of the conductors. 4th, To indemnify passengers for the damage which they may suffer through the fault of the postillions.

Applying strictly and legally the meaning of the sentences contained in the clause this divided, we reach the following conclusion: That Rameriz, at the time of the affair with C. Smith could not be considered a passenger. He did not prove that was such by producing a ticket for a seat or compartment: He could not even prove that he was an employee of the Canal Company with the right to ride on the trains of the Panama Railroad Company. And this being so, and considering Ramirez' insistence, Smith might well believe that Ramirez meant to travel without paying his fare, a circumstance which did not invest Ramirez with the character of a passenger, nor give him the right to recover under the contract of transportation. The injury to Ramirez of February the 7th not having occurred through a defect of the vehicles, the empresarios can not be responsible to him by virtue of that part of the law above analysed. Neither can they be responsible by reason of any fault on their part. The unforseen and unpremediated occurrence which took place between Conductor C. Smith and Felipe Ramirez cannot give rise to the charge of gross fault, ordinary fault, or slight fault, (culpa lata, level or levisima) against the transportation empresarios; A quarrel, a provacation on the part of a recognized passenger, or any other accidental happening of the moment, growing out of the attack or defense of the train conductor, and the resulting injury or crime, cannot be equitably imputed to the fault of the empresarios, for the law does not extend the responsibility for such acts, of themselves personal, to whose who are not culpable. See article 11 of the Penal Code.

The responsibility which carries with it the imposition of a penalty is purely personal, and is never extended to those who are not culpable.

"Through the fault of the conductors or postillions," the fault which may be attributed shall not be, and ought not to be other than that which results from the defective discharge of their duties, such for example as starting before the appointed hour, and at the time when a passenger is about to take the train or car and thereby suffers an injury; the damage inflicted on the persons of passengers by an accident caused by the mishandling of the machinery or carelessness in its use. The occurrence treated of not falling under any of these heads it is deduced that the doctrine of clause No. 4 of article 322 of the Code of Commerce, already analysed, does not apply to it.

IX. (18th) We now proceed to examine the question in the light of the provisions of the Civil Code and to make clear the doctrine of articles 1547 and 1549 of said code.

1547. In order that a person may be obliged to another by an act of declaration of intent, it is necessary first that he be legally capable of obligating himself. The legal capacity of a person consists in his ability to obligate himself by his own act and without the agency or authorization of another.

1548. Every person is capable of obligating himself except those whom the law declares incapable.

1549. Insane persons and those who have not reached the age of puberty are absolutely incapable. Minors who have not attained full legal age, and spendthrifts are also incapable. Besides these there are other special disabilities arising out of the prohibitions which the law imposes respecting certain persons to execute certain acts.

The persons to whom this part of the quoted article refers are those who ought to be under the charge of others, such as minor children who live in the same house with the father or mother; the pupil who lives under the care and guardianship of his tutor or curator, and all those included under the two final paragraphs of the code under consideration. This provision is both wise and clear, its reason being understood.

Thus the heads of colleges and schools respond for the acts of their scholars while the latter are under their care and artisans and empresarios respond for the acts of their apprentices and dependents in like case.

Students, as a rule, are under legal age and on arriving at their colleges or schools, under the law and the school or college regulations they remain under the care of the chiefs of such schools or colleges. The apprentices and dependents of artisans and empresarios render these responsible in like case; that is to say where they are subordinates by reason of the service which they render in a factory office, or store, where they are under the care and control of the enterprise.

The doctrine of this article, which is endeavored to be applied to the case of C. Smith considering him as a department of the Panama Railroad Company, and the latter as consequently responsible for his acts, is not applicable to the case, if it is true that Smith was an employee of the company it can not for that reason be said that he was one of those persons dependent on another or under the care of another, according to the classes enumerated in the foregoing provisions.

X. (19th) That Smith was capable of obligating himself legally is proved by the fact that he was of full age. The same is proved by his character of conductor of the train of the said 7th day of February 1886, for, as has been see, these functions can not be exercised except by those capable of obligating themselves to others. Neither was Smith on the said day an insane person nor a pupil under the guardianship of a tutor or curator. He was an employee of the company, but not its dependent. These words "employee" (empleado) and "dependent" (dependiente) are usually treated as synonymous; but the law and jurisprudence differentiate them. Between "empleado" and "dependiente" there is a great and very palpable difference; the "dependent" of a person, he who is under his guardianship or care, may be employed in the service of that said person; but the "employee" of a

person or enterprise can not be his or its dependent. The dependent of one person under the law, may be the employee of another on whom he does not depend, and in so rendering his services he is not converted into an unemancipated son, nor does he come under the guardianship of his patron or empresario. An employe of the legal status of C. Smith does not bind himself to live under the roof of his chiefs. The law imputes workmen of this class to be legal persons. A legal person is one in whom the law recognizes the capacity to obligate himself. Not so as to persons dependent on others; those who can not obligate themselves without the assistance of others on whom they depend.

XI. (20th) Now then, and going back a little to those considerations in order to apply the doc-
17 trine of article 320 of the Code of Commerce, the Panama Railroad Company cannot be held responsible for the act of train Conductor C. Smith, and this is explained thus: If the tickets for seats or compartments establish the contract of transportation, when the transportation of persons is referred to, and Ramirez could not prove his right to travel as a passenger in the coaches of the enterprise; and if Ramirez could not prove his right by a ticket for a compartment, as an employee of the Interoceanic Canal Company, it is clear that between C. Smith and Felipe Ramirez, the first the train conductor of the company, the chartered common carrier, that is the Panama Railroad Company, and the second, Ramirez, the contract for transportation had not been perfected, and consequently no obligations had been contracted between the former and the latter. If then there existed no contract between Smith and Ramirez, still less could an obligation have been contracted with a third party be reason of an act not connected with his functions as train conductor, etc.

From what has been set out it is deduced that the criminal act committed by C. Smith is purely a personal one, and C. Smith is responsible for it.

Considering all these things the Court, administering justice in the name of the Republic and by authority of the law, revokes the sentence appealed from and declares the Panama Railroad Company absolved from the charge brought against it by Mr. Felipe Ramirez, through his attorney Mr. Isidoro Burgos, demanding sixty thousand pesos for damages and injuries growing out of the criminal act committed by C. Smith on the person of the plaintiff on the 7th day of February, 1886.

Let the resolving part of this sentence be read in public session. Let the parties be notified to attend in the office of the Secretary, to that end, let it be recorded and returned.

AUGUSTIN JOVANE,
ENRIQUE LOPEZ ZAPATA,
Citizen Magistrate President.

The Citizen Magistrate of the third plaza has declined to sign the foregoing sentence, giving as a reason that in accordance with law 61 of the past year it was an attribute of the Supreme Court of the Republic to pronounce sentence in this matter. Panama, January 31, 1887.

JOSE B. VILLAREAL, Secretary.

Presidency of the Superior Court of Justice.

Panama, January 31, 1887.

Let the Citizen Magistrate of the third plaza be served in order that he may be immediately notified of this decision, sign the aforesaid sentence, and in case of disobedience be fined twenty pesos, which will be made effective in conformity with article 6 of the Compilacion of 1880. Let notice issue.

JOVANE-VILLAREAL, Secretary.

I notified the Citizen Magistrate of the third plaza, Mr. Jose Ma. Rodriguez.

RODRIGUEZ-VILLAREAL, Secretary.

The new Tribunal being installed I file this matter in the office of His Excellency the Magistrate President, this the 3d day of February, 1887.

JOSE B. VILLAREAL, Secretary.

Superior Tribunal of the Judicial District.

Panama, February 5th, 1887.

It pertains to the Supreme Court to take cognizance on the final instance of those actions in which foreigners take part, in conformity with clause 5 of section 2, article 21 of law 61 of 1886, and as the present trial was pending in the final instance before the exteingished Superior Court of the department it is order: After citation of the parties, and at the cost of those who interposed the appeal let the decree be remitted to the Supreme Court in order to be made effective.

AGUSTIN JOVANE,
ENRIQUE LOPEZ ZAPATA,
B. PORRAS,
M. J. DIEZ,
JOSE MARIA VIVES PICON,
JOSE VILLAREAL, Secretary.

I notified Mr. Antonio Ramirez E.

RAMIREZ E.—VILLAREAL,
Secretary.

I notified Dr. Pablo Arosemena.

AROSEMENA-VILLAREAL,
Secretary.

Interlined "los" "V" des esta manera" "Articulo 258" El transporte es un." Valid. A. copy. Panama, August 2, 1912. (Signed) Edwin Chandeck, Secretary.

18 An impression of a stamp reading: "Republic of Panama, Province of Panama, Second Circuit Court Judicial Power."

Translation frin tge "Gaceta Judicial" Vol. I. p. 170. Yeard 1. No. 22. Bogota, June 10, 1887.)

Supreme Court of Justice.

Bogota, March 31, 1887.

Submitted: Isidoro Burgos, as attorney of Felipe Ramirez, instituted before the Civil Judge of the Department of Panama, in the extinct state of the same name, an ordinary suit against the Panama Railroad Company for damages and injuries inflicted on the person and interest of the plaintiff, as was alleged, by one of the employes of the enterprise.

The action followed the usual legal course and sentence was pronounced in both instances, and before notice was given of the sentence pronounced by the Superior Tribunal of that section, that body considered that the cognizance of the matter in the second instance pertained to the Supreme Court of Justice, and for that reason they have sent the record of the proceedings to this appellate Court.

Section 9 of law 46 of the present year repealed inciso 5, section 2 of article 21 of law 61 of 1886; and in consequence the superior tribunals of the districts are the ones that ought to review the sentences of the first instances pronounced by the judges of the circuit, in which the rights and obligations of foreigners are treated of.

Wherefore the Supreme Court of Justice, in accord with the Procurador, abstains from entering a judgment in this matter and order that the process be returned to the tribunal transmitting it.

Let notice issue; let it be copied and published.

(Signed) R. ANTONIO MARTINEZ,
JOSE N. SAMPLER,
JULIAN R. COCK BAYER,
FRANCISCO A. FERNANDEZ,
BENJAMIN NORUEGA,
MANUAL A. SANCLETO,
RAMON GUERRA A., Secretary.

On April 1, 1887, I notified the Procurador General of the foregoing decree.

ARRANGO M.—GUERRA, Secretary.

On the 2nd of April, 1887, I notified Mr. Julian Felix de Leon of the foregoing.

DELEON-GUERRA A., Secretary.

Translation.

EXHIBIT "B."

Law No. 37 of 1904.

(Of the 4th of May.)

Title: On the adoption of Codes and amendatory of the provisions of the Civil Code, the National Assembly of Panama.

Decrees.

Article I. That there shall continue in force in the Republic with such amendments and alterations that may be required by their adaption to the national nomenclature, the Colombian Codes of Laws that were in force in the extinguished Department of Panama on the 2nd of November, 1903, except the Code of Elections, and likewise the Administrative Code of the extinguished Sovereign State of Panama, approved October 12, 1870, and the 19 laws supplementary and amendatory thereof and the ordinances enacted by the Departmental Assemblies of Panama supplementary to and reformatory of the above mentioned laws, shall also continue in force in the Republic.

The decrees of a provisional legislative character issued by the Colombian Executive Power have ceased to have force by reason of their having expired by their own terms and in their place in consequence the laws which those decrees modified and to which they related shall be in force.

Article II. In respect to the judicial power, all of the provisions relating to the organization and jurisdiction

of the Courts shall be in force so far as they are not in conflict with the constitutional government of the Republic of Panama.

Article III. The President of the Republic is authorized to appoint a permanent commission composed of three competent and qualified citizens to be charged with the drafting of the project of the Codes that are to govern in the Convention.

The Executive Power shall establish rules for the work of the Commission and fix the salaries of the members thereof. The work done up to the present time by the various commissions named by the Provisional Junta of Government shall be passed through the permanent commission, to the end that they may utilize such works to the extent possible.

The Executive Power shall present the project of codes spoken of in the preceding article eight days after the meeting of the proximate National Legislative Assembly.

Article IV. The conventional interest that exceeds two per cent a month in the contract shall be reduced by the judge to said percentage, if the debtor should require it. In this manner Article 2231 of the Civil Code is amended.

Given in Panama on the second day of May, 1904.

The President: NICOLAS VICTORIA J.
The Secretary: JUAN BRIN.

(Pamphlet of Laws enacted by the Constitutional National Convention of the Republic of Panama in 1904—page 51.)

20 EXHIBIT "C."

(Translation from the "Judicial Gazette," Vol. III, No. 353, p. 332-334.)

Reuperto Restrepo, vs. The Sabana Railway Company (La Compania Del Ferrocarril de la Sabana).

Supreme Court of Justice.

Bogota, July 19, 1892.

Decree: On the 3d day of February, 1890, Ruperto Restrepo filed a complaint in an ordinary suit against the Sabana Railway Company, so that after hearing the company and its manager, and after due trial, the company might be condemned to pay to the plaintiff the damages which he alleged he has suffered by reason of the passage of trains through the hacienda "La Jabonera" and by reason of the occupation of a zone of land which the company took on which to construct the railway without the consent of Francisco Soto Villamizar, the owner of the hacienda which the plaintiff occupies in his character of lessee.

He estimated the amount of damages at two thousand one hundred pesos (P2100) and bases his demand on the following allegations:

"(1) That I am the lessee of the hacienda 'La Jabonera,' the property of Mr. Francisco Soto V. and now belonging to his heirs, since the year 1886.

(2) The railway crosses said hacienda and the tracks occupy an extent of more than 900 meters in length.

(3) Without consent of the owner of the hacienda, and without legal expropriation, the Sabana Railway Company took possession of the necessary strip, and construct its tracks.

(4) This occupation deprives me of the enjoyment of a part of the land held under lease, of an area three fanegadas more or less, and I estimate the damage at two hundred pesos (P200).

(5) The trains in passing through the hacienda have killed or rendered useless the animals whose value I set out below:

"One heifer, ileed, whose value was one hundred and twenty ($120).

Two cows crippled and rendered useless, whose loss in value was one hundred pesos (P100).

Three calves crippled. Loss in value one hundred and eighty pesos (P180).

One thoroughbred bull, damages and rendered useless for breeding purposes. Loss in value one thousand five hundred pesos (P1,500)."

The plaintiff adds that the right, cause or reason of this complaint is that conferred on him by the provisions of chapter 9, title 3, book 4 of the Penal Code, and articles 2341 et. seq. of the Civil Code.

The complaint being allowed to be filed by the First Judge of the Circuit of Bogota, before whom it was presented, that official, the interest which the nation and the Department of Cundinamarca had in the suit being established, ordered the record sent to the Tribunal of this judicial district, which took cognizance thereof, the first instance taking place there by reason of the parties not having reached an agreement in the amicable conference.

After the denial of a motion made by the plaintiffs' attorney, that judgment be taken by default against the manager of the railway company, for not having answered the complaint, the attorney of the said manager interposed dilatory pleas or demurrers—to the jurisdiction, defect in the party plaintiff, and that of the pendency of another suit—which were declared not proven by the Tribunal, which decision was confirmed by the Court.

Before an answer to the complaint was filed the complaint was amended by adding to the damages demanded the sum of seven hundred and eighty-four pesos, fifty centavos (784.50), as the value of three head of cattle killed by the trains of the same railway after the filing of the original complaint and as the value of an account paid to C. L.

21 Vericel for the cure of one brindle calf (ternero sardo) which seems to be the same that was spoken of in the said complaint and the damage to which was estimated at fifteen hundred pesos (P1,500).

The additional charge is made up thus:

Value of one heifer, of cross breed	$300.00
Value of one cow, of cross breed	300.00
Value of one small bull, cross breed	120.00
Value of account paid to Vericel	64.50
Total	$784.50

The complaint so amended was served on the manager and the Fiscal of the Tribunal, who replied to it, denying the right claimed by the plaintiff to demand damages, and offering peremptory exceptions of premature complaint or complaint not in due form, force majeure, and fortuitous event, which were allowed to be filed.

The case went to trial on the facts, and, the legal formalties complied with, the instance was concluded by the sentence of August 28th of the year last past, whose final and resolving part is as follows:

By virtue of what has been established, the tribunal administering justice in the name of the Republic and by authority of law, resolves: (1) The Sabana Railway is hereby acquitted of the charge made in the complaint relative to the payment of damages growing out of the occupation of the zone of land in the hacienda "La Jabonera" without the consent of the owner; (2) The said Railway Company is hereby sentenced to pay to the plaintiff Ruperto Restrepo the sum which in a separate trial the experts may assess as the value of the damages and injuries which he has suffered by reason of the killing and injuring certain live stock owned by him; (3) The plea of permature complaint or complaint not in due form is hereby declared proven in part; (5) The exception of force majeure, or fortuitous event is declared not proven; (6) No judgment as to costs is rendered.

Let notice issue and let this sentence be published, copied and certified to the Supreme Court for its opinion should no appeal be taken.

At the time of notification of the sentence an appeal was interposed by the Fiscal of the Tribunal as well as by the attorney for the company and the attorney for the plaintiff, and the appeal being granted the record of proceedings was sent to this Court, where at the request of the last named, the case was opened for proof, and the proofs solicited by him were produced. The allegations of the the parties being heard and the parties cited for sentence, the Court proceeded to pronounce the corresponding sentence, and in furtherance of which it is necessary to make certain statements.

Naturally the question of the jurisdiction of the Court was not examined into since the Procurador had pronounced on behalf of the Court an opinion favorable to its jurisdiction, because the Court has already resloved the point in favor of its competency when it confirmed the resolution of the Tribunal which declared not proven the dilatòry plea of want of jurisdiction.

The defendant company having been acquitted of the charge of damages and injuries arising out of the occupation of the zone of land in the hacienda "La Jabonera" on which its tracks are laid, the plaintiff far from demonstrating in the second instance that he had any right to bring this charge, and far from proving that the damages amounted to two hundred pesos (200) as alleged in the complaint, said nothing more whatever in regard to it, as may be seen in his last allegation—nor in the expert estimates rendered before this Court was any consideration given by the experts to determine its value. This is proof that the reasons assigned by the Tribunal as the basis of the said acquittal are unanswerable, and the plaintiff himself so considered them. As a matter of fact the charge referred to being based on the fact that the railway company occupied the said zone without the consent of the owner, this act, as the Tribunal points out, would have constituted an offense according to the pro-

22

visions of articles 693 and 694 of the Penal Code in effect at the time the occupation took place; but the responsibility for this delito attached to a juridical entity (entidad juridica) which can not be considered criminally responsible, because we can not suppose in such entities a voluntary and malicious violation of the law by which any penalty may be incurred, a volition and malice which could not exist in an artificial person (ser ficticio), it is clear that if such responsibility exists it can only be exacted of the representative of such entity; so that in exacting the responsibility, as has been done, of the entity itself, the fundamental principle of criminal law which demands that the delinquent and the person condemned be identical, has been violated. " Furthermore " say the Tribunal, "granting that juridical persons were capable of committing punishable acts and that the Sebana Railway Company might have been punished in the case with which we are occupied, even so that action instituted would not have been properly brought, for article 1501 of the Judicial Code prescribes that if the civil action and the criminal action are not brought at the same time the civil action can not be prosecuted until the conclusion of the criminal action with the condemnation of the delinquent.

In addition, neither the plaintiff nor his attorney has proved the plaintiff to be a lessee, in which character he instituted the action, and above all they have completely failed to prove that the value of the damages which constitute this claim amount to the sum of two hundred pesos (P200) as set out in the complaint.

In regard to the damages caused by the killing and injuring of certain animals by the trains of the railroad, the Tribunal considered the company responsible, taking into account that these damages might have existed independently of the delito attributed to the company by reason of its occupation of the zone of land without the consent of the owner, since it is evident that though the road was constricted in a legal manner, such damages could have occurred and have occurred, due to

the fact that the right of way was not properly fenced off, and that responsibility has been recognized by the Manager of the Company, Carlos Tanco, because according to what he has stated on page 17, he was accustomed to make settlements with private persons for the damages caused them by the trains, which settlements were submitted to the Board of Directors for its approval. The Court would have nothing on which to base a contrary opinion, for it rejects the doctrine, as the Tribunal rejected it, that the damages referred to were the work of force majeure or irotuitous cause, which the attorney for the company plead as a peremptory exception. The fact that in some cases it is practically impossible to avoid running over animals found on the railway, because it is not possible to stop the train at a given moment, ought not to be considered a sufficient reason for declaring the obligation extinguished, for it is certainly possible to avoid such occurrences by segregating the line by means of suitable fences, as the same company has already done on a great part of its line.

However, as has been seen, the sentence of the Tribunal although it declares the responsibility of the company in relation to the damages suffered by the plaintiff by reason of the killing and crippling of some of his animals, could not determine the sum to which such damages amounted, for lack of necessary legal proof, principally the expert estimate indispensable in these cases. Consequently it was natural that the attorney for the plaintiff should attempt to better the proofs in the second instance, in the sense of fixing the number of animals killed and the number injured or rendered useless, since the assessment of experts should be limited to the value of the first and the depreciation of the last, by means of the personal knowledge which they might have had of such animals. Nevertheless, no proof was pro-
23 duced in that regard, and not even the ratification of the witnesses Leon Escobedo and Abdon Pineda was secured, whose testimony would have served to prove the value of the damages to the brindle calf spoken of in the complaint, and which testimony the Tribunal

rejected on account of the lack of legal ratification of their statements. The other proofs of the first instance were reduced to the declarations of Campo Elias Torre, Carlos Tanco, Ricardo Morales and Simon de la Torre, which appear on pages 16 to 19 of the record. The first of these witnesses only states that the trains ran over two animals, a cow and a heifer or yearling bull, in passing through "La Jabonera" and he knows that they were crippled, but that he can make no statement as to the value of those cattle because it could not be established.

The witness Carlos Tanco says that "he knows that certain animals were crippled by the trains, in the pastures of "La Jobonera", that in his opinion the herd of Mr. Restrepo is of very good grade, but he does not know nor can he state the number of animals which were killed or injured.

The witness Ricardo Morales asserts: "That it is true and a fact that within his knowledge that the brindle calf owned by Restrepo was rendered useless by the trains and also that the cattle owned by Restrepo were killed;" and further down he states that the same trains have killed ten or twelve cattle belonging to Restrepo, and that he knows this because he saw part of the cattle which were killed, and by information received from Mr. Restrepo.

The witness Simon de la Torre also says that "He knew the brindle calf; that he did not know all of the cattle belonging to the said gentlemen, which were rendered useless, but he remembers having seen the two cows rendered completely useless" —adding afterwards that he knows because he saw it, that the trains killed the two cows which he referred to, and that he knows by hearsay that a greater part of the cows were killed and rendered useless.

As is seen, only the last of these witnesses alleges having witnessed the fact that the trains killed two cows. The witness Morales only says that he knows that the trains killed ten or twelve cattle and that he saw some of those animals which were killed, which proves that he did not see how they were killed. The statement of

this witness is in contradiction to that made by the plaintiff, since as has been seen, in the original complaint a charge was made only for one heifer which was valued at one hundred and twenty pesos (P120), and in the amended complaint for three more cattle, which are specified thus: One cross-bred heifer, one cow, and one small bull. From which it is deduced that if the statement of the plaintiff is true, that of the witness Morales, who speaks of ten or twelve cattle killed, can not be accepted.

It is then clear from every point of view, as the Tribunal observes, that the full and necessary proof of the number of cattle killed by the trains of the railroad was not produced in the first instance, and as, in the second instance no addition proof of this fact, was adduced, it is clear that the Court can not fix any sum whatsoever as to the value of the animals killed. The first expert, estimate made by Isidoro Gaitan and Augustin A. Jiminez was rejected by the Court because it attempted to fix the value of animals in general through the knowledge which the experts had of those values, when what was needed was to estimate the value of the cattle killed by the trains, and the depreciation by crippling or damaging the others. It is useless to know that these experts estimated a young thoroughbred bull at one thousand pesos, a thoroughbred cow at eleven hundred pesos, a cross-bred cow at one hundred and fifty pesos, an ox at one hundred and fifty pesos, a cross bred bull calk [calf] at one hundred and twenty pesos, and a donkey at forty pesos; consequently the order of February last it was decreed that the experts should fix the value of each one of the cattle killed by reason of being struck by the railroad train and the depreciation or amount of damages suffered by the other from the same cause.

The expert Gaitan in his second report states:
24 "That in Serrazuela he was shown by Mr. Ruperto Restrepo a young brindle bull, which he stated to be the same thoroughbred mentioned in the complaint and which had been struck by a locomotive, and he found that by reason of a blow which he had suffered

during his growing age he had not been able to reach complete development in a manner corresponding to his breed and quality and for that reason he (the expert) estimated the damage to the bull at five hundred pesos." And the expert adds: "as the other animals injured by the locomotive no longer exist, according to the statement of Mr. Restrepo, and as no other was shown to me for its respective valuation, and those killed of which I have no knowledge, have already been valued in my first report, according to their class, taking into account their alleged breed and quality, I judge that I have complied with my duty, which I hope may accomplish the desired end."

The expert Jiminez, after saying that he went to the hacienda managed by Mr. Restrepo, in order to see the animals injured or wounded in order to comply with what had been ordered, adds: "Mr. Restrepo informed me that all of the animals injured or wounded by the railroad train, with the exception of a young thoroughbred bull which he showed me, had died from the cause stated, for which reason I can not assign to such animals any other value than that which I gave them in my previous report, with reference to their class. In regard to the depreciation of the young bull mentioned I also estimate that a five hundred pesos.

According to the second report there was no estimate of the animals killed, nor could there have been since the experts were not familiar with him; from which it is the experts were not familiar with them; from which it is deduced that neither can the Court formulate any charge against the railroad company for a value not ascertainable.

In regard to the damage or depreciation of the young bull shown to the experts by the plaintiff, it is true it has been uniformly estimated at five hundred pesos; but the Court must again observe that no proof has been produced that the damage was caused by a train or locomotive of the railroad company since the witnesses Leon Escobedo and Abdon Pineda who affirmed the fact on rendering their declarations before the municipal judge of Madrid, and the ratification of which was solicited before the Tribunal, which ratification had no legal value on account

of not being made in accordance with the requirements of article 638 of the Judicial Code, as was pointed out by the Tribunal itself, and they can not be considered by the Court on account of the lack of confirmation of the said ratification. There exists, then, no legal proof that the damage resulting from the depreciation of the bull,, estimated at five hundred pesos, was caused by the trains or locomotive of the railroad, and in this case the Court can not declare that the defendant company is responsible for the damages or its value.

It is true that the payment to Vericel of sixty-four pesos and fifty centavos for the cure of one brindle calf appears to be proved, but as the deponent himself say, on acknowledging his signature and the facts of payment, he did not see the accident and cannot affirm that the trains of the Sebana Railway injured the calk [calf] and if anything is known to him concerning the matter it is through having it heard it through the interested parties themselves.

From what has been set forth it is easily deduced that the recourse of appeal having been interposed on the party of the plaintiff against the judgment of the first instance, which condemned the defendant company to pay a sum which should be fixed in a separate trial as the value of the damages and injuries growing out of the killing and crippling of certain cattle belonging to the said plaintiff, the latter proposed on interposing the said recourse, as his attorney stated, to fix the value in the second instance, and thus avoid the separate trial with the same object, which should have followed. But there having been produced no legal proof which the Court could use as a basis for condemning the company to pay a certain sum it is evident that the verdict appealed from could not be amended in the sense of fixing the indicated value; still less could the Court deny the justice of the verdict in so far as it condemned the company to pay the damages which might be ascertained in a legal manner in a separate trial, for it could not ignore the existence of those damages in respect to the killing and injuring of certain of the plaintiff's animals, though

up to now it has not been possible to satisfactorily assess the amount of said damages, and the Court does not believe as the Procurador believes that the defendant company ought to be acquitted of all the charges in the complaint, inasmuch as the institution of a new suit has become unnecessary, grating that in this instance it has not been possible to establish that amount on account of the insufficiency of the proofs. The Court believes on the contrary that the right of the plaintiff to indemnity being recognized, he can not be deprived of that right which he has in conformity with article 840 of the Judicial Code of having the value fixed and determined in separate trial, which can not be considered carried out simply by a substantiation of this second instance.

Therefore, the Supreme Court, partly in accord with the opinion of the Procurador, administering justice in the name of the Republic and by authority of law, confirms the sentence appealed from.

Let notice issue, let it be copied, published in the Judicial Gazette and let the record be returned.

(Signed) LUCIO A. POMBO
LOUIS M. ISAZA,
JESUS CASAS ROJAS,
MANUEL EZEQUIEL CORRALES,
MARIANO DE JESUS MEDINA,
EMILIO RUIZ BARRETO,
JUAN EVANGELISTA TRUJILLO,
GABRIEL ROSAS, Secretary.

Indorsed: Filed 10/13/15.

MINUTES OF NOVEMBER 6, 1915.

Toppin & Green
vs. SS. No. 96-97.
Panama Railroad Co.

This day it is agreed in open Court that plaintiffs are to demur to defendants' answer herein and that the same will be taken under advisement by the Court.

MINUTES OF FEBRUARY 5, 1916.

Green & Toppin
vs. SS. No. 96 and 97.
P. R. R. Co.

On this day on motion of the plaintiffs the Court grants to the plaintiff 10 days in which to amend complaint.

MINUTES OF FEBRUARY 24, 1916.

Joseph T. Toppin
vs. SS. No. 96.
Panama Railroad Co.

On this day this cause being called the plaintiff is granted twenty days in which to file to file amended
26 complaint.

* * * * * * * * * * * * * * *

MINUTES OF SEPTEMBER 14, 1916.

Joseph T. Toppin
vs. No. 96.
Panama Railroad Co.

On this day this cause being called on motion of the plaintiff the Court allows the plaintiff one week in which to file his amended complaint.

* * * * * * * * * * * * * * *

AMENDED COMPLAINT.

United States of America.

The District Court Within and for the Division of Cristoba' District of the Canal Zone.

Joseph T. Toppin, plaintiff,
vs
Panama Railroad Co. (a Corporation), Defendant.

Amended Complaint.

The plaintiff, by his attorneys, W. C. Todd and Wm. MacIntyre, leave of Court having first been
27 obtained, files this his Amended Complaint, and alleges:

1. That he is a resident of the City of Colon, Rep. de Panama.

2. That the defendant is a private corporation, existing under and by virtue of the laws of the State of New York, U. S. A., and is a common carrier of persons and freight for hire within the Canal Zone, and owning property and maintaining offices therein; and as an adjunct to its main lines of tracks within the Canal Zone, also owns and operates a railroad track along Broadway Street, in the City of Colon, R. P.

3. That on the fourth day of July, 1914, plaintiff was riding a stallion, the property of one T. A. Green, under a gratuitous bailment, along Broadway Street, in the said City of Colon; and while so riding said horse along said street, and near the corner of Nonth street, in said City of Colon, the said horse suddenly became unmanageable and bolted and swerved and attempted to cross said Broadway Street at the Ninth Street crossing. That plaintiff did everything in his power to control said horse and to direct him along said Broadway Street.

4. That at said time and near said place, the defendant, through its agents, servants and employees, was operating a railroad locomotive on its said track on Broadway, the said Broadway Street being a public street and thoroughfare, at a careless, reckless and unlawful rate of speed, towit: from 16 to 20 miles per hour. That the said Broadway and Ninth Streets run at right angles to each other, and at their intersection was and is a public crossing whereat the defendant negligently and unlawfully failed to provide any protection whatever; and along on its said track on Broadway Street, and near said public crossing, the said defendant was operating its
28 said locomotive without ringing any bell or sounding any whistle or warning; and when the said stallion on which plaintiff was riding in the manner as aforesaid came near to said crossing he suddenly became unmanageable as aforesaid, and in spite of all plaintiff could do to restrain him, he got upon said crossing and the track of the defendant, when the said locomotive of the defendant, then on its said track on Broadway Street, and near said crossing, and being handled and operated in the manner as herein above stated, ran into and against the said horse killing him and throwing plaintiff violently to the ground thereby inflicting grave and serious bruises and other bodily injuries to plaintiff, whereby he suffered grave and serious bruises and sprains, particularly in his left hip; and on account of said injuries occasioned as aforesaid, plaintiff has suffered and is now suffering great and serious bodily pain and intense mental anguish, and has had to spend for medical attendance $..... U. S. C., and has been incapacitated from performing his work from said July 4th, 1914, until the present time. That said injuries, occasioned as aforesaid, are of a permanent nature and wholly due to the carelessness and negligence of the defendant, plaintiff being without fault or blame in the premises. All of which to plaintiff's damage in the sum of $15,000.00 U. S. C.

5. That the laws in force in the Republic of Panama, the country in which the matters and things herein com-

plained of occurred, at the time when said matters and things occurred are as follows:

Art. 2341, Civil Code of Panama:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed."

Art. 5. Law 62, 1887:

"Railroad companies are responsible for the wrongs and injuries which are caused to persons or
29 properties by reason of the service of said railroads and which are imputable to want of care, neglect, or violation of the respective police regulations which shall be issued by the Government as soon as the law is promulgated."

Arts. 488, 489, Police Code:

"When a tramway crosses a town, as well as when it passes by a gate or vidcut, it shall not travel at a greater speed than that of a wagon drawn by horses at a moderate trot; in case of an infraction the conductor or the administrator of the company subsidiarily shall pay a fine of 10 to 100 pesos, without prejudice to the responsibility, civil or penal, to which he may be subjected by reason of the damage, fault, or tort:

"The tramway, when passing places where there are or may be a gathering of persons, shall call their attention from afar, and continue to call the attention of the transient persons, by means of a whistle, bell horn, or other adequate instrument. Every infraction of this provision shall be punished with a fine of from 5 to 100 pesos; but if the omission should occasion damage or prejudice to a third person, the procedure provided for in the preceding article shall be followed;

"This article and the previous article shall be applied to railroads when they enter cities or towns."

Wherefore, plaintiff prays judgment against the defendant in the sum of $15,000.00 U. S. C. and for costs.

(sgd) W. C. TODD, and
(sgd) WM. C. MACINTYRE,
Attorneys for Plaintiff.

Indorsed: Filed 12/2/16.

DEFENDANT'S DEMURRER TO AMENDED COMPLAINT.

United States of America, Canal Zone.

In the District Court in and for the Division of Cristobal, Canal Zone.

Joseph T. Toppin, Plaintiff,
vs. Civil No. 96.
Panama Railroad Company, a Corporation, Defendant.

Defendant's Demurrer to Amended Complaint.

30 Comes now the Defendant Company in the above styled and numbered cause, by its counsel, Frank Feuille and Walter F. Vzn Dame, and demurs to Plaintiff's Amended Complaint herein filed on the ground that said Amended Complaint does not state facts sufficient to constitute a cause of action.

THE PANAMA RAILROAD CO.,
A Corporation, Defendant
By its Counsel,
(Sgd.) FRANK FEUILLE,
(Sgd.) WALTER F. VAN DAME.

Indorsed: Filed 12-51-6

* * * * * * * * * * * * * * *

MINUTES OF MARCH 21, 1917.

Joseph T. Toppin,
vs. No. 96.
Panama Railroad Co.

On this day this cause coming on for hearing on demurrer and the plaintiff being present in Court Argument of plaintiff being heard the Court overrules said demurrer and orders that answer be filed in ten days.

MINUTES OF MARCH 23, 1917.

Joseph T. Toppin
vs. No. 96
Panama R. R. Co.

Comes now the defendant on this 23rd day
31 of March and notes its exceptions to the ruling of the Court overruling the demurrer.

DEFENDANT'S ANSWER TO AMENDED COMPLAINT.

United States of America.

In the District Court of the Canal Zone, Cristobal Division.

Joseph T. Toppin, Plaintiff,
vs. No. 96
Panama Railroad Company, Defendant

Defendant's Answer to Plaintiff's Amended Complaint.

Now comes the Panama Railroad Company, by its attorneys Frank Feuille and Walter F. Van Dame, and

without waiving any of its demurrers and exceptions heretofore filed in this case, but in all things insisting on such demurrers and exceptions, files this answer to the plaintiff's amended complaint, filed herein December 2, 1916.

And so answering defendant denies all and singular, the allegations of plaintiff's amended complaint, except that part wherein it is charged that the defendant is a corporation, doing business in the Canal Zone, which is admitted.

And for special answer herein, the defendant denies that the plaintiff is entitled to recover herein against the defendant, under the laws of the Republic of Panama;

And the defendant herein alleges that under and by virtue of the laws of Panama, specifically set out in the amended complaint, and the rules and decisions of the Courts of Panama and Colombia, of which latter country Panama formed a part before 1903, a corporation cannot be held responsible for the penal acts or omissions of its agents and servants, which principle was announced by the Supreme Court of Bogata on the 19th day of July, 1892, in the case of Ruperto Restrepo vs. the Sabana Railway Company (La Compania del Ferrocarril de la Sabana), which opinion is published in the Ju-
32 dicial Gazette of Bogata, Vol. 1, page 170, copy of which opinion will be submitted upon the trial of this case, together with other evidence, in support of the allegations of defendant's answer.

Premises considered, defendant prays for judgment and for costs, and for all other and further relief, general and special, to which it may be entitled.

Respectfully,

(Sgd.) FRANK FEUILLE,

(Sgd.) WALTER F. VAN DAME.

Attorneys for the Panama Railroad Company, Defendant.

Indorsed: Filed 3-30-17.

* * * * * * * * * * * * * * *

DEMAND FOR TRIAL BY JURY.

United States of America, Canal Zone.

In the District Court of the Canal Zone, Cristobal Division.

Joseph T. Toppin, Plaintiff,
vs. Civil No. 96.
The Panama Railroad Company, Defendant.

Demand for trial by jury.

Comes now the defendant company in the above styled and numbered cause, by its attorneys, Frank Feuille and Walter F. Van Dame, and demands that the said cause be tried by jury.

THE PANAMA RAILROAD COMPANY,
Defendant,

(Sgd.) By FRANK FEUILLE,
(Sgd.) By WALTER F. VAN DAME,
Its attorneys.

Indorsed: Filed 4-6-17.

---

33 MINUTES OF APRIL 7 1917.

Joseph T. Toppin,
vs. No. 96
Panama Railroad Co.

On this day this case being called on the request for trail by jury the Court grants said request and continues the cause to April 12th for setting of date of trial.

* * * * * * * * * * * * * * * *

MOTION FOR PHYSICAL EXAMINATION.

United States of America, Canal Zone.

In the District Court of the Canal Zone, Division of Cristobal.

Joseph T. Toppin, Plaintiff,
vs. No. 96
Panama Railroad Company, Defendant.

Motion for an Order to Require Plaintiff to Submit to a Physical Examination.

Comes now the Panama Railroad Company, a Corporation, by its counsel, Frank Feuille and Walter F. Van Dame, and shows the Honorable Court:

1. That in paragraph four (4) of plaintiff's amended complaint, filed by him on December 2, 1916,
34 it is in part alleged that plaintiff "has been incapacitated from performing his work from said July 4, 1914, until the present time. That said injuries, occasion as aforesaid, are of a permanent nature, etc."

2. That the records of the Panama Canal hospitals indicate that plaintiff was discharged therefrom in the last instance, on January 15, 1915, since which time the defendant company has not seen plaintiff;

3. That defendant company is entirely without means of ascertaining the real truth relative to the place, extent, and permanency of the injuries it is alleged plaintiff is still suffering from, and the reason for said permanent injuries;

Wherefore, it is prayed that the Honorable Court issue an order upon plaintiff, the said Joseph T. Toppin, through his attorneys, Messrs. Todd and MacIntyre, requiring that the said plaintiff be and appear before any reputable

physician within the Canal Zone or the Republic of Panama that may be designated by Your Honor at any time and place within four or five days of the day of the trial of this cause, for the purpose of submitting himself to a physical examination.

(Sgd.) FRANK FEUILLE,
(Sgd.) WALTER F. VAN DAME,
Attorneys for P. R. R. Co., Defendant

United States of America, Canal Zone.

Before me, E. M. Goolsby, Clerk of the District Court of the Canal Zone for the Division of Balboa, personally appeared Walter F. Van Dame, of counsel for the defendant Company in the above styled and numbered cause, and whom after being by me duly sworn according to law, deposes and says:

35 That he has read the herein motion and knows the contents thereof and that the allegations therein contained are true except as to those matters and things stated on information and belief, and as to those matters and things he believes said allegations to be true.

Subscribed and sworn to before me this twenty-first day of May, nineteen hundred and seventeen, at Ancon, Canal Zone.

(sgd) WALTER F. VAN DAME.

(Seal)

(sgd) E. M. GOOLSBY,
Clerk, District Court of the
Canal Zone.

Indorsed: Filed May 22, 1917.

ORDER.

United States of America, Canal Zone.

In the District Court of the Canal Zone, Division of Cristobal.

Joseph T Toppin, Plaintiff,
vs. Civil No. 96.
Panama Railroad Company, Defendant.

Order.

Application having been made by the defendant in the above entitled action that the plaintiff herein be required to submit to a physical examination prior to the date set for the trial of this action.

Now, by agreement of counsel (Mr. Walter F. Van Dame for defendant and Mr. Wm. C. MacIntyre, for plaintiff), it is ordered:

That the plaintiff herein, Joseph T. Toppin, on date of May 28th or May 29th, or at the convenience of the examining physician, present himself to Dr. S. L. Taylor, of Colon, R. de P., with the request from this Court that the said Dr. S. J. Taylor make as thorough as possible a physical examination of the present condition of the said plaintiff, and that the said Dr. S. J. Taylor,
36 at the date of the trial, June 1st, 1917, make a report to this Court of his findings.

It is further ordered, that the expense of the said physical examination, including the fees of the physician for appearing and testifying in Court, be paid entirely by the defendant, the Panama Railroad Company.

Let certified copies of this order be served upon the plaintiff and defendant, and a copy sent to Dr. S. J. Taylor for his information.

(sgd) WM. H. JACKSON,
District Judge.

Attest: A true copy.

(sgd) E. M. GOOLSBY,
(Seal.) Clerk of Court.

Indorsed: Filed 5/26/17.

* * * * * * * * * * * * * * *

MOTION TO AMEND.

United States of America, ss.
Panama Canal.

In the District Court for the Canal Zone, Division of Cristobal.

Joseph T. Toppin, Plaintiff,
vs. No. 96 Civil.
The Panama Railroad Company, Etc.

Motion to be Allowed to Amend.

37 Comes now the above-named plaintiff, Joseph T. Toppin, by W. O. Todd and Wm. C. MacIntyre, his attorneys, and, in accordance with the provisions of Section No. 103 of the Code of Civil Procedure of the Canal Zone, respectfully begs leave of this Honorable Court to be allowed to amend his Amended Complaint heretofore filed herein, in the following particular, towit:

In the averment of damages contained in said complaint, to be allowed to plead and to set forth more definitely and certain than now appears in said Amended Complaint, special damages to the business of plaintiff, suffered directly through and on account of the injury received by plaintiff from defendant as set forth in said complaint.

(sgd) W. C. TODD,
(sgd) WM. C. MACINTYRE,
Attorneys for Plaintiff.

I, William C. MacIntyre, one of the attorneys for plaintiff, do hereby certify that notice of this motion was duly given unto defendant by mailing a copy hereof unto

Mr. Frank Feuille, chief counsel for defendant, at his office at Ancon, C. Z., on date of June 10, 1917.

(sgd) WM. C. MACINTYRE.

Indorsed: Filed 6/11/17.

MINUTES OF JUNE 15th 1917.

Joseph T. Toppin

vs. No. 96.

Panama Railroad Co.

On this 15th day of June, 1917, this cause coming on to be heard and the parties thereto being present in Court, the plaintiff in person and by his attorneys, Wm. C. MacIntyre and W. C. Todd and the defendant being present in Court by its attorneys, Frank Feuille and Walter F. Van Dame and arguments on plaintiff's mo-
38 tion to amend being heard, the Court overrules said motion to which the plaintiff notes his exceptions. And issues being joined it is ordered that a jury come whereupon come the jurors of a jury of twelve good and lawful men, to-wit: J. P. Prochaska, M. Terroter, W. Gorth, Charles N. Gronto, J. J. Duffy, T. W. Eaton, George Cartwright, George E. R. Duer, E. J. Ryan, R. B. Downing, W. E. Kemper, and R. S. Houston, who being duly elected tried and sworn well and truly to try the issues joined herein and a true verdict render according to the law and the evidence, now comes the plaintiff and presents his motion for an ocular inspection which motion is by the Court allowed and ocular inspection ordered. And the jury having made the ocular inspection and having returned into Court now comes the plaintiff and moves for a stereoptican inspection which motion is by the Court overruled and exceptions of plaintiff noted. And now comes the defendant and moves that N. A. Becker be sworn as stenographer and it is so ordered. And wit-

nesses being sworn and testimony heard and the jury having heard all the evidence adduced. The Court orders the said cause continued to June 16th for argument.

MOTION FOR OPTICAL INSPECTION.

United States of America, ss.
Panama Canal.

In the District Court for the Canal Zone, Cristobal Division.

Joseph T. Toppin, Plaintiff,
vs. No. 96. Civil.
The Panama Railroad Company, Etc., Defendant.

Motion that Court and Jury View the Scene of the Accident From Which this Case Arose.

Comes now the plaintiff above-named, by his attorneys, W. C. Todd and Wm. C. MacIntyre, and respectfully shows unto this Honorable Court, as follows:

That in the pleadings herein the plaintiff has affirmed and the defendant denied the following facts:

39 1st. That defendant owns and operates railroad tracks on a certain street known as Broadway, in the City of Colon.

2nd. That the intersection of Broadway and 9th Street, Colon, is a public thoroughfare in the City of Colon, R. de P.

3rd. That the defendant company fails to provide and maintain gates, crossing signals or any other safety device for the public at said crossing.

That, in order for the jury to fully understand all of the facts connected with this case, as well as to prove

the truth of the affirmative allegations of the plaintiff, above stated, it is necessary for the Court and jury to see and inspect the scene of said accident at Broadway and 9th Street, Colon, R. de P.

That the said scene of said accident is within ten minutes walking distance from this Courthouse.

Wherefore plaintiff moves this Court that before taking any testimony in this case, the Court and jury go to and inspect the said scene of the said accident to plaintiff, at Broadway and Ninth Street, Colon, R. de P.

(sgd) W. C. TODD,
(sgd) WM. C. MACINTYRE,
Attorneys for Plaintiff.

Indorsed: Filed June 15th, 1917.

MOTION FOR STEREOPTICAN INSPECTION.

United States of America, ss.
Panama Canal.

In the District Court for the Canal Zone, Cristobal Division.

Joseph T. Toppin, Plaintiff,
vs. No. 96. Civil.
The Panama Railroad Company, Etc., Defendant.

Motion that the Court and Jury View the X-Ray Stereoptican Slides Made of the Location of Plaintiff's Injury at Ancon Hospital.

Comes now Joseph T. Toppin, the plaintiff herein, by Wm. C. MacIntyre, and W. C. Todd, his attorneys, and respectfully shows unto this Honorable
40 Court as follows:

That on date of April 11, 1917, for the purpose of fully demonstrating to this Court and jury the nature

and extent of his injuries, plaintiff presented himself at the X-Ray Laboratory of Ancon Hospital, Ancon, C. Z., and paid the sum of Fifteen Dollars, U. S. C. for X-Ray photographs to be taken of the location of the injury and affected parts of his body. That at the time of the making of said X-Ray photographs, Dr. Duncan was in charge of the X-Ray Laboratory and made the photographs.

That on date of May 26th, William C. MacIntyre, plaintiff's attorney, called at the X-Ray Laboratory of Ancon Hospital for the purpose of securing said plates in order to produce the same at the trial of this cause. That at said time the said attorney was advised that Dr. Duncan was no longer in charge of the laboratory, but that the same was under the charge of Dr. Salisbury. That William C. MacIntyre then went to the operating room of Ancon Hospital to see Dr. Salisbury and to obtain the plates. That Dr. Salisbury told William C. MacIntyre as follows: That the plates were the property of the Panama Canal; that even though plaintiff had paid for the taking of the X-Ray photographs, he was not entitled to have the said plates; that the X-Ray plates could not leave the hospital; that the X-Ray plates could not be sent to Dr. Herrick or to Dr. Taylor to be examined to assist said doctors in making examination. Wm. C. MacIntyre then asked Dr. Salisbury if prints could not be taken from the plates and submitted to the above-mentioned physicians. Dr. Salisbury informed Wm. C. MacIntyre that said plates were stereoptican plates and could only be examined by being thrown upon a screen by a stereoptican machine; that Drs. Herrick and Taylor were at liberty to call at the X-Ray laboratory and view the stereoptican exhibition of the said plates. Dr. Salisbury likewise told the said attorney, that to the best
41 of his recollection, the notes made by Dr. Duncan who had taken the X-Ray photographs, stated that the plates showed a tuberculous condition of the spine. That plaintiff's case rests upon his ability to produce evidence that he is suffering from tuberculosis of the spine as a result of an injury to his spine and hip,

caused by the negligence of the Panama Railroad Company. That it is very essential to plaintiff's case that the Court and jury view the X-Ray stereoptican views showing the tubercular condition of plaintiff's spine. That Dr. Taylor, the medical expert called by this Honorable Court at the instance of defendant and by consent of plaintiff, will be able to make a more thorough diagnosis of plaintiff's case and explain the reasons thereof, after seeing said X-Ray reproduction of the affected area of plaintiff's spine.

Wherefore, it being impossible, as per statement of Dr. Salisbury, for this Court or Jury to see and examine said plates, or for Dr. Taylor to form a complete diagnosis without first viewing the stereopticon reproduction of the said X Ray photographs, Plaintiff respectfully moves this Court that the Court and Jury, and witness Dr. S. J. Taylor, proceed to the X Ray Laboratory of Ancon Hospital in order to view the stereopticon reproduction of the X Ray photographs which will show the injured condition of Plaintiff's spine.

Attorneys for plaintiff.

Unites States of America, Canal Zone, ss.
District Court.

William C. MacIntyre, of lawful age, being first duly sworn, according to law, on oath says

That he, as one of the attorneys for Joseph T. Toppin, the Plaintiff herein, drew and prepared the foregoing motion and knows the contents thereof and that the facts therein sta ed are true.

42 (Sgd.) WM. C. MACINTYRE.

Subscribed and sworn to before me this 15th day of June, 1917.

(Sgd.) W. B. CHEATHAM,
(Seal) Asst. Clerk of the Court.

Indorsed: Filed June 15th, 1917.

MINUTES OF JUNE 16, 1917.

Joseph T. Toppin,
vs. No. 96
Panama Railroad Co.

On this 16th day of June, 1917, this cause coming on pursuant to continuance of June 15th and the parties thereto being present in Court and the jurors being also present Arguments of counsel are heard and the jury having heard all the evidence adduced say we the jury on the issues joined herein find for the plaintiff and assess his damages in the sum of $10,000.00.

Whereupon the defendant enters herein its motion for a new trial.

MOTION FOR NEW TRIAL.

United States of America, Canal Zone.

In the District Court of the Canal Zone for the Division of Cristobal.

Joseph T. Toppin, Plaintiff,
vs. Civil No. 96.
The Panama Railroad Co., Defendant.

Defendant's Motion for a New Trial.

Now comes the Panama Railroad Company, by its attorneys Frank Feuille and Walter F. Van Dame, and respectfully asks the Court to arrest the judgment in the above numbered and styled cause, and set aside the verdict of the jury and grant the defendant a new trial, for the following reasons:

43 First: Because the Court erred in overruling defendant's demurrer to the plaintiff's amended complaint;

Second: Because the Court overruled the defendant's motion requesting the Court to direct the jury to bring in a verdict for the defendant. Said ruling of the Court was in error:

(1) Because under the facts and the law of the case plaintiff was not entitled to a recovery under the laws of Panama;

(2) Because the plaintiff was not entitled to recovery under the laws of the Canal Zone.

Third: The Court erred in instructing the jury that the plaintiff was authorized to recover under the Panama law, and to which portion of the charge the defendant then and there in open Court excepted. The portion of the charge referred to reads as follows:

"In the next place the defendant sets up certain laws and decisions of the Courts of Colombia and the Courts of Panama as a defense of this action, by virtue of which it claims that in the first place the railroad company is not responsible for the torts of its servants and employees. I take it to mean that if the company has shown proper care in the selection of its agents and servants it is not liable. In the next place it sets up the fact that the operating of a railroad over the streets of a city without ringing the bell and going faster than a horse would go at a moderate trot, constitutes an offense under the police laws of Panama, for which those operating the train might be fined, and its defense in that respect is that a corporation cannot be held responsible for the criminal acts of its agents, which principle the defendant, through its counsel, claims has been announced by the Supreme Court of Colombia and the Supreme Court of Panama. You must take the law from what this Court tells you, and if this Court is in error as to the law it gives you, then the plaintiff or defendant have their rights to appeal to the Court of Appeals at New Orleans, and from there to the Supreme Court of the United States, to see that the law is pro-

perly applied. But you, gentlemen, are required to take the law as I give it to you, and I charge you that a railroad corporation is responsible for the negligent acts of its employees, agents and servants and that it is not the law as alleged by the defendant that they are not liable although they may use the greatest care in the selection of their servants, agents, and employees. A corporation acts only through its servants, agents and employees, and the law holds the corporation responsible for any illegitimate and direct consequences of a negligent act of any agent, servant or employee, however much care it may have exercised about the selection of that employee.

"Furthermore, I charge you that although a law may make an act of a corporation and offense so that those servants or agents committing it might be fined
44 and dealt with criminally, nevertheless, if injury results to one by reason thereof, and if the act which is at the same time punishable under the criminal or municipal laws is at the same time an act which is negligent, that is, one in which they have failed to exercise the proper care, circumspection and prudence under the circumstances, the company may be held liable notwithstanding the fact that the law also requires a criminal process."

The instruction in question was error:

(1) Because under the laws of Panama, which were submitted in evidence, and as construed by the Supreme Court of Bogata in the opinion rendered in the case of Restrepo vs. the Sebana Railway Company on the 19th day of July, 1892, and of which opinion this Court must take judicial knowledge, the defendant is not liable for the criminal acts of its agents, servants and employees.

(2) Because the Court deprived the defendant of a substantial right under the civil code of Panama, in instructing the jury that the defendant would be liable, although it may have used the greatest care in the selection of its servants, agents and employees, and that the

defendant would be liable for the negligent act of any agent, servant and employee, however much care defendant may have exercised about the selection of that employee.

Fourth: The Court erred in its charge to the jury in that portion thereof given in respect to the question as to whether or not the plaintiff had developed tuberculosis as a result of the injury he received. The defendant excepted to that portion of the charge then and there in open Court.

The portion of the charge objected to reads as follows:

"Now there is another element in the case as to the permanency of his injuries. He claims that he is permanently disabled, and if you so find you are entitled to allow damages on account of the permanent nature of the injury. He claims also that tuberculosis of the spine has developed as a result of this injury. Now, we have heard a great deal of medical learning here on that subject, that we all, more or less, have the germs of tuberculosis in our system, and that sometimes it developes and sometimes it does not. It sometimes developes as a result of an injury. He claims that this injury developed tuberculosis of the spine. Now, Gentlemen, I charge you as follows: If the plaintiff has developed tuberculosis of the spine as a result of the injuries received, then you may consider the tuberculosis as an element of damages, provided, of course, that you find for the plaintiff. By this
45 I mean to be understood as saying that every person is liable for the natural consequences of its own negligence. It is liable for the consequences that might be reasonably expected to follow or flow from its negligence, its negligent acts, and if one person has troubles peculiar to himself as distinguished from the generality of us, that he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequences of the act resulting to the ordinary individual, and in that connection you have a right to consider what the doctor said that seventy-five

or eighty-five per cent have latent infirmities which might be developed as a result of an injury."

The portion of the charge here objected to was error:

(1) Because there was no evidence to authorize the submission of any such issue to the jury. There was no evidence before the jury authorizing them to find that the defendant had tuberculosis or tuberculous germs at the time of the injury complained of by him. There was no evidence in the record tending to prove that the tuberculosis abcesses existed prior to December 1, 1914, and the uncontroverted evidence of Doctor Taylor, supported by the medical authorities read in evidence by counsel for plaintiff and defendant conclusively established the fact that tuberculous abcesses must appear within three months after the injury is received.

(2) Because the charge of the Court authorized the jury to find that the tuberculous abcesses might have resulted from the injury complained of by plaintiff, notwithstanding more than three months had elapsed from the date of the injury before the abcesses appeared.

(3) Because the charge of the Court permitted the jury to find for the plaintiff, although he may not have had tuberculosis in his system at the time of the injury and the tuberculous condition developed afterward.

Fifth: The Court erred in charging the jury that they should consider physical pain and suffering as an element of damages, and to which portion of the charge the defendant then and there in open Court excepted.

The portion of the charge objected to reads as
46 follows:

"If you find for the plaintiff I charge you that physical pain and suffering is an element of damages that you may consider. You may consider physical pain and suffering

which the plaintiff has suffered as an element of damages in this case, but it is impossible for any of us to say how much he has suffered in dollars and cents; but nevertheless it is an element of damages in this case."

The portion of the charge in question is objectionable:

(1) Because there was no evidence before the Court respecting the laws of Panama to authorize the jury to allow damages for physical pain and suffering;

(2) Because under the laws of Panama damages are not recoverable for physical pain and suffering;

(3) Because under the laws of the Canal Zone damages are not recoverable for physical pain and suffering.

Sixth: The verdict of the jury is contrary to the evidence:

(1) Because the only evidence submitted respecting the development of tuberculosis by the plaintiff showed that it did not develope until more than three months after the accident complained of by the plaintiff, and could not have been the result of that accident.

Seventh: The damages awarded by the jury were grossly excessive in amount, and not justified by the evidence or the law in the case.

The premises considered, defendant prays that upon a hearing of this motion the verdict of the jury to be set aside, and a new trial granted, in order that justice may be done.

Respectfully,
THE PANAMA RAILROAD COMPANY,
Defendant

(By) (Sgd.) FRANK FEUILLE.
(Sgd.) WALTER F. VAN DAME, Its attorneys.

Indorsed: Filed 6/21/17.

47 ORDER CONTINUING TIME OF ARGUMENT ON MOTION FOR NEW TRIAL.

United States of America, Canal Zone.

District Court of the Canal Zone for the Division of Cristobal.

Joseph T. Toppin, Plaintiff,
vs. Civil No. 96.
Panama Railroad Company, Defendant.

Order.

Ordered, upon request of counsel for the plaintiff, that arguments on defendant company's motion for a new trial, heretofore filed on June 20, 1917, during the current term of this Court, be submitted in the Courthouse at Cristobal on Friday, July 6th, 1917, at 9:00 A. M., or as soon thereafter on the said date as to the Court may be convenient, without prejudice to the defendant company's right of appeal on account of the fact that such arguments on said motion for a new trial were not heard by the Court within the current term.

(Sgd.) WM. H. JACKSON,
District Judge.

Attest: This June 25th, 1917.
(Sgd.) E. M. GOOLSBY,
(Seal) Clerk of the District Court.

Indorsed: Filed 6/23/17.

MINUTES OF JULY 5, 1917.

Joseph T. Toppin,
vs. No. 96.
Panama Railroad Co.

Parties present and in open Court at Ancon argue motion for new trial, Judge Feuille for defendant and W. C. MacIntyre for plaintiff. The Court takes the
48 matter under advisement.

MINUTES OF JULY 16th, 1917.

Joseph T. Toppin
vs. No. 96
Panama Railroad Co.

On this day the Court files it opinion overruling the motion for a new trial to which ruling of the Court the defendant enters its exceptions. And the Court allows thirty days for the filing of Bill of Exceptions, therefore it is considered by the Court that the plaintiff do have and recover of and from the defendant his said damages of Ten thousand dollars in form as by the jury assessed together with his costs in this behalf expended and have execution therefore. And now comes the defendant and enters its exceptions to the judgment.

OPINION ON MOTION FOR NEW TRIAL.

United States of America, Canal Zone.

In the District Court of the Canal Zone, Division of Cristobal.

Joseph T. Toppin, Plaintiff,
vs. Civil No. 96
The Panama Railroad Co. Defendant.

Opinion on Motion for new trial.

At the trial hereof the jury empaneled and sworn rendered a verdict in favor of the plaintiff for the sum of $10,000.00 United States Currency on account of personal injuries received by the plaintiff as the result of a collision between an engine of the defendant company and a horse upon which the plaintiff was riding at the time. The defendant has filed and orally argued a motion for a new trial, the principal grounds for said motion being:

First: That the Court erred in instructing
49 the jury that the plaintiff was authorized to recover under the Panamanian law.

Second. That the Court erred in charging the jury that they might consider physical pain and suffering as an element of damages.

Third. That the Court erred in its charge to the jury in that portion thereof given in respect to the question as to whether or not the plaintiff has developed tuberculosis of the spine as a result of the injury, and

Fourth: That the damages awarded by the jury were grossly excessive in amount and not justified by the evidence or the law of the case.

With reference to the first proposition the Court charged the jury as follows:

"I charge you that a railroad corporation is responsible for the negligent acts of its employes, agents and servants, and that it is not the law, as claimed by the defendant, that they are not liable, although they may use the greatest care in the selection of their servants, agents and employes.

A corporation acts only through its servants, agents and employes, and the law holds that the corporation responsible for any legitimate and direct consequences of a negligent act of any agent, servant or employe, however much care it may have exercised in and about the selection of such employes."

As this proposition of law has been repeatedly decided by this Court and the Supreme Court of the Canal Zone, and has been expressly affirmed by the United States Circuit Court of Appeals in the cases of Beckwith versus the Panama Railroad Company and Bosse versus the Panama Railroad Company, this alleged error need not be further considered here.

The Court further charged the jury in this respect as follows:

"I charge you that, although a law may make an act of a corporation an offense so that the servants or agents committing it might be fined or dealt with criminally, nevertheless if injury results to one by reason thereof, and if the act, which is punishable under the criminal or municipal laws, is at the same time negligent; that is, one in which they have failed to exercise the proper care, circumspection and prudence under the circumstances, the company may be held liable notwithstanding the fact that the law also provides a criminal penalty."

It would seem that this charge was strictly in accordance with the provision of Section 2341 of the Civil Code which provides, "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense

committed." The objection to this part of the charge cannot, therefore, be considered as well taken.

The second objection as to the consideration by the jury of pain and suffering as an element of damages has also been repeatedly passed upon by this Court and the Supreme Court of the Canal Zone, and twice by the United States Circuit Court of Appeals, which, therefore, eliminates this objection so far as the action of this Court is concerned.

With reference to the third proposition propounded by counsel for the defendant the Court charged the jury as follows:

"He claims that this injury developed tuberculosis of the spine. Now, gentlemen, I charge you as follows: If the plaintiff has developed tuberculosis of the spine as a result of the injuries received, then you may consider such tuberculosis as an element of damages provided, of course, that you find for the plaintiff. By this I mean to be understood as saying that every person is liable for the natural consequences of his own negligence. He is liable for the consequences that might be reasonably expected to follow or flow from his negligence, his negligent acts, and if a person has troubles or infirmities peculiar to himself as distinguished from the generality of us; that is, if he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequences of the act resulting to the ordinary individual that may be considered by the jury in estimating damages. But in that connection you have a right to consider what the doctor said that 75 or 85 percent have latent infirmities which might be developed as a result of an injury."

The Court in this respect gave to the jury that view of the law most favorable to the defendant. There are many authorities that hold that any and all consequences resulting from a negligent act are recoverable, notwithstanding the fact that the

51

party receiving such injury suffered from latent or peculiar infirmities so that the injuries which resulted to him would not have resulted to an ordinarily normal person. There is a decided and irreconcilable conflict of authorities on this proposition, but in its charge to the jury this Court adopted the other view; that is, the view most favorable to the defendant, and charged the jury that they might not consider as an element of damages physical consequences that resulted from latent or uncommon infirmities.

Defendant's counsel in his argument upon the motion for a new trial contended that the charge of the Court was not as full and specific in this respect as it should have been, and that the Court should have specifically charged the jury that if the tuberculosis resulted from causes other than the injury the defendant was not liable therefor. But this idea was clearly embraced in the charge of the Court because the Court charged the jury that they must find affirmatively that the tuberculosis was the result of the injury in order to predicate a claim for damages thereon. Furthermore, the defendant's counsel asked no specific or explanatory charge by the Court to the jury in this respect. If he felt that the subject had not been fully recovered by the Court in its charge it was incumbent upon him to direct the Court's attention thereto and ask a specific charge thereon, and a general exception to one entire feature of a charge is not sufficient as a predicate for error. Courts universally hold that the specific matter should be called to the attention of the Court by way of a request for a more explanatory charge.

As to the fourth contention, namely, that the damages were grossly excessive in amount, the Court will frankly state that the verdict of $10,000.00 was in excess
52 of any verdict which it would have rendered had the case been submitted to the Court without the intervention of the jury, but I cannot find from the evidence that the verdict of the jury was the result of passion or prejudice, or in utter disregard of the evidence or the principles of law applicable thereto. Under the provisions of the Panama Canal Act either party is entitled upon demand to a jury in any criminal or civil case,

and when a jury is had and its verdict rendered, then, upon well recognized principles of law, this verdict should not be set aside or reduced in amount merely because the judge may disagree with the jury as to the amount which they should have rendered. This would be to substitute the verdict of the Court for the verdixr [verdict] of the jury. This is especially so in tort actions. In contract cases a judge may well set aside a verdict of a jury or order a reduction thereof if he considers that the verdict of the jury embraces items or claims upon the contract which are not supported by any evidence, or which are contrary to law, but in tort actions where the jury has once found the general question of liability in favor of the plaintiff and against the defendant the question of damages is one peculiarly for its consideration. For instance, in this case, suppose the Court should set aside the verdict as being excessive and another jury should render a verdict for $7,500.00, and suppose the Court should set aside that verdict as excessive, and should continue so to do until the verdict of some jury finally coincided with the opinion of the judge, the result would be to substitute the verdict of the judge for the verdict of the jury in a case where the law has especially provided that the parties are entitled to a trial by jury, and when the defendant itself, by its attorney, demanded a trial by jury.

53 The principle above stated has been very generally upheld and approved by Federal and State Courts in our country. The proposition cannot be better stated than the following quotation from Sutherland on Damages, Vol. 2, Page 459, as follows:

"Where there is not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the Court will not, ordinarily, interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the Court; and the law does not recognize in the latter the power to substitute its own

judgment for that of the jury. Although the verdict may be considerably more or less than in the judgment of the Court it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice or gross mistake; or in other words that it is the result of accident or perverted judgment, and not of cool and impartial deliberation."

The same view was upheld by Judge Hammond of the Federal Court in a lengthy and able opinion reported in 90th Federal Reported 783. To the same effect see 13th Cyc. —. 122, quoting from Mr. Justice Story, as follows:

"A verdict will not be set aside in a case of tort for excessive damages, unless the Court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated:

"In action for personal injuries in deciding whether a verdict is excessive or not, the Court will usually take into consideration whether the injuries are permanent or only temporary. Where it appears from the evidence that the injury complained of has proved or is liable to prove permanent, the appellate Courts are little inclined to interfere on the ground of excessive damages not only where there is a probability of permanent injury, but where the evidence shows that a possibility exists. Even where the evidence is conflicting as to the permanency of the injury or where the recovery is doubtful the Courts will not set aside a verdict as excessive."

For the foregoing reason it follows that the motion for a new trial must be and is hereby overruled.

(sgd) WM. H. JACKSON,
District Judge.

Indorsed: Filed 7/16/17.

54 STATEMENT OF FACTS AND BILL OF EXCEPTIONS.

United States of America, Canal Zone.

In the District Court of the Canal Zone, Cristobal Division.

Joseph T. Toppin, Plaintiff,
vs. Civil No. 96.
The Panama Railroad Company, Defendant.

Be it remembered that upon the trial of the above entitled cause, on the fifteenth and sixteenth days of June, 1917, in the town of Cristobal, Canal Zone, the following proceedings were had:

The parties having announced ready for trial, and a jury of twelve good and lawful men having been selected, impaneled and sworn to try the issues of said cause, and the jury, upon motion of plaintiff's attorneys, having been taken to the scene of the accident at Ninth Street and Broadway, Colon, the plaintiff, in order to sustain the issues in his behalf, adduced the following evidence:

GEORGE PETERS testified for the plaintiff, as follows:

My name is George Peters; I live in Broadway, Colon; I know the plaintiff, Mr. Toppin, by sight. On July 4, 1914, I was on Broadway facing north and I heard a horse's trot behind me and I glanced back. The horse was coming at a medium trot. I was in the Broadway garage at the time I saw Toppin on the horse. Mr. Toppin was riding the horse. I was in the garage on Broadway at the time when I heard the horse's trot; I turned and saw the horse; he was going north. I saw Mr. Toppin again about a minute afterward when the engine had just bounced the horse, and Mr. Toppin fell against the hydrant, and the horse kept on staggering and went over against a cement roller nearby. The garage is about thirty-five feet from the crossing of 9th Street

and Broadway. I saw Toppin and the horse just as the engine bounced against him and he fell against the hydrant. I didn't see anything before the accident; I didn't hear any whistle of the engine nor did I hear a bell; there was nothing that attracted my mind at all; just as I looked up I saw the accident. I have heard bells and whistles in working around and in that garage. I think I would have heard the bell had it been rung, or the whistle had it blown; I didn't hear either. I am a chauffeur and have been engaged in that work five years last December. I had been a chauffeur two years at the time of the accident. I should say that the engine was going about thirty miles an hour and was going that fast after it struck the horse. The engine stopped opposite the hydrant on 10th Street. That man over there in white (meaning the witness, Pellage), got off the engine and came back to the scene of the accident. Toppin said nothing to him, but Pellage came running and said "Young man, you are hurt. You must go to the hospital," and then Toppin replied, "I am not going with you," and he asked him again. After that someone came back. I don't know who he was, and he said "Let's make a statement," and he said "What's your name?" and Toppin told him.

55 Cross Examination.

I am from Dominica and have been in Colon nine years. At a rough calculation I should say that this garage is from thirty to thirty-five feet south of 9th Street. I have worked at that garage for four years; I have heard trains going by there and I have heard bells and whistles and the noise of trains for four years. On this particular occasion I noticed that the bell of the engine was not ringing. It was not ringing at the time of the accident. I looked out and the man was getting up. The bell was not ringing. I saw the accident. I saw the engine just as it struck the horse down. I saw Toppin just as he was getting off the horse; the engine kept on hitting him and pushed him about twenty-five feet to where the cement roller was. It did not push the horse

all the way from one side of 9th Street to the other; the horse was staggering and fell in the road. The horse was just at the corner of the hydrant when the engine hit him; he was about three feet from the hydrant when the engine hit him. When the engine passsed the garage it was going at the rate of thirty miles an hour; it stopped at 10th Street. I should judge there is about 125 feet between blocks. The engine traveled about eighty feet after it passed me and stopped. It was raining that day and the track was very slippery. Toppin got up and stood in the street and held his hand on his side, and I told him to go to the hospital because he was trying to move around, but he couldn't move. He went to where the horse fell, and the horse kept on trying to walk and lie down. He went over there and then he went to the sidewalk. About a half a minute after that Toppin went to the sidewalk in front of the Chinaman's store. Toppin was on the sidewalk when Pellage got to him; he was the only man I know of the engine crew who got to him. I heard one man say I have to make a statement. I didn't know him, and up to now I couldn't point him out to you. The horse was not running away when I saw him; he was going at an ordinary trot. The horse was only three feet from the hydrant when the engine struck him, and it pushed the horse about 25 feet. All the time the engine was pushing the horse the horse was on his feet, but when he got near the hydrant he fell. He kept on kicking until he got to the other side.

S. FARRELL, witness for the plaintiff, testified as follows:

My name is S. Farrell; I am a tailor ; I work on Bottle Alley in Colon. I know the plaintiff Joseph Toppin; I saw him on July 4, 1914, on a horse trying to cross the track at 9th and Broadway; he was trying to get across. In the meantime I looked down a block and a half and saw an engine coming at top speed; I saw Toppin had an unmanageable horse and when the engine got about twenty

yards from the horse the horse turned his right hip to the engine and the engine hit it and Toppin got a good fall. I went and asked him if he was hurt. He tried to drag himself over on the sidewalk and the horse got up on the road and started to drag up the same sidewalk, and a short time after the horse got on the sidewalk he died. I am no judge of the speed of an engine, but it was going very fast; it was a very attractive speed; that is what caused me to watch it. No whistle was blown or no bell was rung. I didn't see anybody on the front of the engine; the hedge fence was a bit high. I was on 9th Street Corner and Broadway. I saw a man in the window of the engine on the right side; I guess he was the engineer; he was looking backward. The engine traveled after it struck the horse until it reached 10th Street.

Cross Examination.

Toppin was on the track. I don't know exactly which direction he came from. He was simply trying to get the horse off; I suppose he was going to the stable. The horse was prancing, he looked unmanageable. Toppin did not go to the stable because he could not
56 get the horse across at the time; the horse was ungovernable so I don't know what he was trying to do; he pranced on the track; the engine was a little over a block away when the horse was prancing on the track, in a northerly direction, a little over a block. The engine, when I saw it, was between 7th and 8th Streets. I heard no bell; if it was ringing I suppose I ought to have heard it; it could not have rung without my having noticed it. I was paying attention then; I could see the engine plainly. I suppose Toppin could see the engine. I saw the engine hit the horse; the front part of the engine hit the horse. I saw the flagman on the front part of the engine afterwards; he was on the footboard in front when the engine struck the horse; the collision between the engine and the horse did not knock the flagman off; that would not interfere with the flagman; he got off the engine after it stopped. When the engine

struck the horse it knocked him right down; it knocked him a little distance away, I could not say how many feet. After the horse was struck Toppin fell off the horse and afterwards got up and tried to get over to the opposite sidewalk. Toppin fell near the pump; he hesitated about nine or ten seconds and then walked over to the sidewalk and the engine continued running very fast. It was stopped at 10th Street. Those blocks are about 100 yards long. I noticed only one of the engine crew who came back to speak to Toppin. I presume they all did, but I paid no attention to them as I was watching the way the horse died.

CHARLES DOWNES testified on behalf of the plaintiff as follows:

My name is Charles Downes; I know the plaintiff, Joseph Toppin. I am a coachman and was a coachman on July 4, 1914. I saw the plaintiff on the afternoon of that day on horseback on Broadway; I was in a coach coming from the stables. Just as I was coming from the stable in my coach the rain was falling and I had my curtain up and saw Toppin coming on a horse. The horse was prancing and trying to get on the track. I saw the engine coming from Coolie town at a fast speed. After I saw the engine coming at top speed I checked my horse and I said: "Toppin look out, look out," and Toppin pulled this way and the horse go that way. The engine came between me, and I could not tell where the engine bumped the horse, but I saw Toppin and the horse on the ground. I saw a man on the front of the engine doing that way (indicates stop signal.) I don't know how far the engine went after striking Toppin. I have no idea how fast it was going, but it was going very fast. No bells were ringing and no whistles blown; I am sure of that.

Cross Examination.

It was raining very hard; I had put up my curtain. I am accustomed to hear the bell ringing and did not hear it. My stable is not very far from the place of the accident, only a few blocks. I was comin', from the stable. When I first saw the engine it was between 7th and 8th Streets. I looked out before taking the crossing. When I saw the engine between 7th and 8th Streets the horse was prancing on the track and just a couple of inches from it. Toppin could see the engine as well as I, but the horse would not go with him. He didn't get down to lead the horse, the engine was coming so fast. He pulled the horse this way, believing he would be more safe. He had no whip and no spurs; the horse was pretty flighty and he was trying to get him off. The horse was prancing on the track and Toppin tried to get him over, and when he pulled he went the other way. I don't know why Toppin would not let the horse go the way he wanted to go. I stopped with my coach just in the center of "E"
57 Street. "E" Street and Broadway are what they call Broadway. I didn't pay any attention about the distance of my coach from the track. It would be hard to say whether the horse would have gotten off the track if Toppin had allowed him to go the way he wanted to go. The horse wanted to go one way and Toppin was pulling him in another. Toppin tried to get him off the side of the track. I could not say that the horse wanted to go to the stable. Toppin was pulling him away from the track that way and this way. There is two crossings to the stable, one this way and one that. Toppin pulled the horse away from the stable from the direction of the track. I didn't pay any attention to the stable. I didn't see the engine hit the horse because the engine barred me; I was sitting in my coach. I didn't see the engine hit him, the engine passed in front of me and the horse fluttered and I said: "Look out, Toppin", and after the engine passed I saw Toppin trying to get up and a man lifted him up and another one held him, and he walked over to the Chinese shop. Five minutes after that he

took him to the police station in my coach. The case was reported to the police and I left him there at the station. I carried him there in my coach. I didn't go inside of the station and don't know if Toppin made a complaint. I didn't pay any attention to the horse after that. The engine stopped at 10th Street at the hydrant.

J. PELLAGE, testified on behalf of the plaintiff, as follows:

My name is J. Pellage. At the present time I have no occupation. My occupation on July 4, 1914, was with the Transportation Department of the Panama Railroad as a switchman; I was on engine 253. The rest of the crew were Foreman Ellis, engineer Moorfoot, brakeman Stamp, fireman Hines and breakman Curtis. On July 4, 1914, we went down Broadway on the engine to a place between 2nd and 3rd St. The engine was standing there an hour or an hour and a half. We were sent down there by the yardmaster to have a look at the races. When we finished our work in the yard I went to the yardmaster and asked him to go down to Broadway and see the races, and Yardmaster Bryan told us to go there. It was by his instructions that we went there. We left there at about 3:30 P. M. I was on the front of the engine on the engineer's side, the right side. The engine was running up Broadway about 18 or 20 miles an hour, a high rate of speed. The engine was going faster than a horse's trot; it was going faster than a horse can run; it was going faster than a man can run. I have been working as switchman since 1908; I worked there for pretty nearly six years and a half as switchman; I am used to getting off trains in motion; I could not have gotten off that engine at the rate of speed it was going. I was sitting on the front of the engine on the right side, and when we got up to 8th Street I saw a horse on the crossing, and at the same time I gave a slow signal, and after turning around I saw that the engineer did not answer my signal and I saw him standing this way (indicates by stand-

ing sidewise.) The foreman was inside the engine facing the throttle, and the engineer had his back to me and was wiping his hands on a piece of waste. He did not answer and at the same time we ran up and hit the horse. I was standing on the footboard on the right side. I didn't get hit, because at the same time I jumped up on the cylinder box. No whistle was blown or no bell rung. If the engineer had been paying attention to his duty he could have stopped the engine and prevented the accident. The engine ran to about 10th Street. I motioned the engineer and he paid no attention to my signal
58 and I opened the angle cock on the front end of the engine and stopped it. Under no condition would the engineer stop. The engineer did not get off the engine after the accident. I was the first man to hit the ground after the engine came to a full stop, and the flagman got off the engine and we both went down there. The engineer didn't go at all.

Counsel for plaintiff then read to the witness, Pellage, a statement from letter of Mr Williams, Attorney for the Panama Railroad, as follows:

"The locomotive was moving slowly, about three and one-half miles an hour, with the bell ringing. The locomotive was under control and could have been stopped within a short distance. The engineer noticed the horse and rider on the side of track and the rider at that time apparently had his horse under control. Just as the locomotive got to the crossing the horse sprang upon the track and was struck by the engine, the rider managing to pull the horse to one side so that the engine struck the horse on the left hip."

And Counsel for the plaintiff then asked the witness if statement contained in Mr. William's letter was true, and Pellage replied:

"No sir. When the engine came to a stop I was on the footboard and I hit the ground. I went down to the Chinese corner and I found Toppin sitting there and the

foreman came from the engine and both of us went down there. Beside that there was nobody from the crew hit the ground. The engineer was scared to get off because he would be arrested."

(Narrative statement of witness continued.) The only statement I heard Toppin make to Foreman Ellis was his name.

When we got to the Yard office I was sitting on the front end still. The foreman jumped off and I met him at the step, and he said "I am going to make a statement." He said "That engine was going some" and I said "Yes, he was going pretty fast." After that I said to Engineer Moorfoot "Did you see what you did down there" and he says "The hell with that, he could get out of the way." The next day a statement was brought to me by foreman Ellis, and I said "I will not sign it; I have nothing to do with it." I did not sign the statement and was discharged after that. That was on the 5th or 7th of July that I was discharged. Since then I have been employed off and on at times. I was employed by the Transportation Department of the Railroad, but never on a regular job since that time. I had been working since 1908.

Cross Examination.

I am from Martinique. I had been working for the Panama Railroad for several years and left here. I was a regular man. After this accident they let me work one or two days at a time. I am working now with the Fruit Company, as a stevedore on the docks. The engine was near 8th St. crossing when I first saw the horse. The horse was standing in the middle of the track, raising and kicking, and unmanageable to the rider. The rider was trying to turn the horse from the track to the west. The stable is on the other side of the track. The horse was rearing and kicking, and Toppin saw he could not make it; he would not go backward or forward. There was nothing to prevent the rider from seeing the engine.

The engine was coming about 18 or 20 miles an hour. It was raining and the tracks were slippery. The engineer was not paying any attention. I could
59 not tell anything about the fireman. The foreman is the man I saw facing the throttle. The foreman is the conductor. No one made any attempt to stop the engine after the horse was struck. I compelled the engine to stop by opening the air cock. That was near 10th Street, about ten feet from the Street crossing. I was about twenty feet from the crossing when I pulled the air cock, and the wheels slid and I stopped in ten feet, ten feet from the 10th Street crossing. Conductor Ellis and I have had some trouble. We went to Court and were both fined. Of course, that is our private business; I had a row with Conductor Ellis in my house. That is true. I didn't come here for that, I came here to tell the truth. Ellis and I don't speak. I don't give anything against him. I am called here as a witness, and I give a statement what I know about things.

JOSEPH T. TOPPIN, plaintiff testified in his own behalf as follows:

My name is Joseph T. Toppin; I am the plaintiff in this case. At the present time I am a saloon keeper, and have been in that business since 1908. Prior to that I was employed by the Panama Railroad as head chainman and rodman. On July 4, 1914, I was riding a horse, the property of Mr. T. A. Green, along Broadway going north, and when I got to 9th Street the horse made a spring toward the railroad track and got up on the track. The horse stood there pulling and rearing up and prancing around, and at the same time I tried to pull him and he would not go to this side or that; he simply reared and would go into the air and I was tired of holding him. He would bend his head and prance and then stood there for a little time and was going on in that same way and somebody yelled "Look out, Toppin" and I looked around knowing that I was on the railroad track, and I saw an

engine coming away off directly south, and I continued the best in my power to get the horse off the track. I turned him towards "E" Street and I turned him north, east and west, and he would not go, just simply swerved. At that time I heard somebody say "Toppin, look out, look out, the engine is coming." I looked to see how near the engine was, and I am not absolutely sure, but I think it was the distance of 8th Street. I did everything in my power to take the horse off the track; he turned this way and that way, and I very nearly succeeded in getting the horse off the track when the engine struck the horse on the right hip and I fell off. The engine struck him some little distance up to the fire hydrant and the horse went on with the same speed rolling until he struck the concrete roller some distance from the hydrant. My side was very painful and the back and upper shoulder, but I tried to get across the street and some one came to me and held this hand and conveyed me to the door of the Chinese shop on the corner opposite. I sat down there on the concrete and some one gave me water to drink, and soon after a man, I guess it was the flagman, came up to me and said "You are hurt, come go to the hospital." I told him I would not go. He turned around to me again and said "Come on, go to the Hospital, you are hurt." I said "I will not go." He said to me "Was it our fault" and before I could get a chance to answer the people around said "Sure it is your fault." I spoke nothing to him except concerning the hospital business. He got into an argument with some people there, and another man came and said "We have got to make a statement of it anyway" and he said "What is your name?" I said "I am Joseph Toppin" and he left the place. A man came with a coach and took me to the police station in Colon. Someone made a statement and asked me what was the matter, and of course the policeman
60 was present and he made a statement that I had just been knocked down at Broadway and 9th St. crossing. I immediately went to Dr. Taylor's office and Dr. Taylor was not there. I tried to get down the

stair case and the coach took me home and I was conveyed up stairs with the assistance of another man and I lay in bed until evening when Dr. Blake came. Dr. Blake attended me until I went to Colon Hospital. I staid in bed for a week until I could step off the bed, and then I staid in an easy chair but could not walk. I had to get someone to take me to the toilet, and sometime in September I took to bed altogether. I grew worse and worse and was taken to Colon Hospital. I was transferred to Ancon Hospital, and at my own request, because I didn't get treatment suitable at Ancon, I was transferred to Santo Tomas Hospital. I left Santo Tomas hospital in February, 1915. I was laid up in bed from that time until September, 1915, before I could get around to walk. I had three operations, two in Ancon Hospital and one in Santo Tomas Hospital. I had the wounds which I had to dress by my own means, and up to the present time I cannot move around and do my duties as I was accustomed to.

(At the request of plaintiff's attorney, Toppin showed the scars from the operations to the Court and Jury.)

I was not able to go back to my place of business up to the time it was burned out by fire on April 30, 1915. I was never injured before or since the accident. I left my room about two or three times from the time of the accident until I went to the hospital. I left my room to go to Dr. Blake's office at Folks River. I rode down on Frederick Leacock's back to the coach. I took to bed after the accident in September. I went to the hospital the latter part of December, I think it was some time near the Christmas season. The last day I can remember of any experience I was lying in bed up to the 22nd. That was the last day I had experience of lying in bed home. I am sure that I did not receive any other injury during that time. I was home until September, laid up in an easy chair, but finally I took to bed in September and I never got up until I was taken out to the hospital in a stretcher. I suffered pain from the time I

was laid up. The effect of the pain was first a stiffness in the hip and then pain in the left leg which became drawn so I could not put it on the ground, and I had pains so that I could not sleep in the night; and after that my hip became swollen and Dr. Blake was treating me and I called his attention to it and he started treating it and it continued that way until I took to bed. I was in September when I took to bed that I noticed that my leg was drawn up. The pain had been increasing until I went to the hospital. I was sick before that in 1905, with malarial fever for nine days. I have never had syphilis. Dr. Taylor took a Wasserman test of my blood. Before I got hurt I was doing a business of about $800.00 Gold a month; about $320.00 Gold or 40% of that was profit. I was not able to go to the saloon after that, and according to reports the business fell off, and at the time of the fire in April it came to about $200.00. When I was laid up I had to employ Frederick Leacock; I paid him $45.00 a month. I employed him up to April 30, 1915. I have employed a man since I opened the cantina, and pay him $45.00 Gold a month. I expended $437.00 Gold on medical expenses. I am still suffering pain; cannot stay up more than two or three hours at the most; I cannot do more than a half mile walk, and it is very tiresome; running I can't do at all. It is impossible for me to ride a horse. I am not a jockey by profession, but I have trained horses for races.

61 (By Mr. MacIntyre):

Toppin, after you got out of the hospital did you make any efforts to obtain from Ancon Hospital the records of your case?

(Answer). I certainly did.

(Objected to by Judge Feuille.)

(By Mr. MacIntyre):

We desire to show that the Ancon authorities did everything in their power to keep the records away from Toppin.

There are certain things which are going to come up from the testimony of the Ancon physicians that the jury should know—the attitude of the hospital. Toppin paid $15.00 for his Ex Ray plates and they told him that the Ex Ray plates could not leave the hospital, and yet they gave them to the railroad attorneys. I wish to read these letters—

(By Judge Jackson):
The objection is sustained.

(By Mr. MacIntyre):
May I read these letters?

(By Judge Jackson):
They are not material to the case between Toppin and the Panama Railroad. (Mr. MacIntyre offers the correspondence in evidence, which is refused.)

Objection sustained and plaintiff's exception noted.

(By Mr. MacIntyre):
Toppin, did you go to Ancon Hospital sometime in April to have an Ex Ray photograph taken?
(Answer) I did.

(By Mr. MacIntyre):
How much did they charge you?
(Answer) Fifteen dollars.
(Question) Did they give you the plates?
(Answer) No, sir; they refused me.
(Question) Do you know what they did with the plates?
(Answer) I understand they gave them to Dr. Taylor.

Cross Examination.

I am from Barbadoes, and have been on the Isthmus thirteen years. At first I worked for the French consul and afterwards for the Panama Railroad. I worked for

the Panama Railroad for about three years, for forty-five dollars gold a month. I went in the saloon business as soon as I quit the railroad, and I continued in the saloon business until the present time. I had a girl working for me in the saloon in 1914; I had a man working for me then, only a girl. I borrowed a horse on the 4th of July, 1914, to go the see the races on Bolivar Street. I
62 don't know anything about the horse trying to get to the stable. He certainly did not bolt before he got to 9th Street, but when I got to 9th Street he swerved to get across the track. The stable was across the track, fully two blocks away. The horse did not become unmanageable until after I started to go across the track. I know he swerved across the track. I don't know whether he was trying to get across the track; he stood there wheeling and prancing around there.

At this point counsel for the plaintiff stated to the plaintiff: "I want to read to you what is set out in your original complaint and ask you if that is true or not. Here is your original complaint filed on July 3, 1915. Here is what it says:

"That on the fourth day of July, 1914, plaintiff was riding a stallion, the property of one T. A. Green, along Browdway, in the city of Colon, R. de P., and while riding said stallion, or horse, at or near the corner of Ninth St. and Broadway, Colon said stallion or horse became suddenly unmanageable and bolted and swerved and attempted to cross Broadway at Ninth Street crossing and go to its stable on the east side of Broadway near Ninth St."

"Is that statement true?"

Plaintiff answered: "I did not make any statement concerning swerving or going to the stable."

(Counsel for defendant:)

"Is that original statement true?"

(Answer:) "Not in some parts."

(Counsel for defendant:)
"In what part?"
(Answer:) "That part where it says swerving and going to the stable.' "
(Counsel for Defendant:)
"Then he did bolt?"
(Answer:) "He did bolt at the 9th Street crossing."
(Counsel for Defendant:)
"Then why is this statement made in your original complaint if it is not true?"
(Answer:) "I guess it was my attorneys drawed it up that way."
(Counsel for defendant:)
"Then they were mistaken?"
(Answer:) "Well, very likely they were mistaken."

And again, counsel for the defendant said to the plaintiff: "Now, in your amended complaint that is now before the jury I find the following statement:

"That on the fourth day of July, 1914, plain-
63 tiff was riding a stallion, the property of one T. A. Green under a gratuitous bailment, along Broadway street in the city of Colon; and while so riding said horse long said street, and near the corner of Ninth street, in said City of Colon, the said horse suddenly became unmanageable and bolted and swerved and attempted to cross Broadway Street at the Ninth Street crossing. That plaintiff did everything in his power to control said horse and to direct him along said Broadway Street.

"Is that true?"
(Answer:) "Sure."
(Counsel for defendant:)
"Does that conform with the statement that you have made on your direct examination?"
(Answer:) "That statement that you are reading don't state that I said he was trying to get to the stable."

(Counsel for defendant:)

"But it says that he bolted and swerved and attempted to cross Broadway Street in the 9th Street crossing and plaintiff did everything in his power to control said horse and to direct him along said Broadway Street. Is that true?'

(Answer:) "That statement is correct."

(Narrative of plaintiff on stand continued.) I was going to Third Street to the races. I don't know that my horse was trying to get across the track; I don't know that he was trying to get to the stable. I don't know anything about what he wanted to do. He wouldn't go forward or backward. I was doing all in my power to keep him off the track. When the engine struck the horse the horse's head faced south and the hind feet of the horse were just at the edge of the track. If he had got the chance to do just as much as that (indicates about six inches) he would have saved the engine from striking him. I cannot exactly state how far the engine was away from me when my horse was in that position, but I think when I saw the engine when somebody yelled at me it was just about 8th Street crossing. My horse was a half a foot within the track. He was between the track in the center on the north side of Ninth Street. The horse's hind quarter was about a half a foot upon the track just as the engine struck him. The engine did not carry me. The engine struck the horse and the horse fell against me with the same speed that the engine struck the horse and the horse rolled until he struck the roller in 9th Street. I lay near the hydrant. The horse fell on top of me when I struck the hydrant, but he kept on rolling. He rolled over and over. He rolled on me first. I went right down and he kept on rolling the same speed. The horse went about forty feet from where he was struck. He lay down on the street with his head on the edge of the concrete and died there. He fell over the hydrant. I didn't let the horse cross over because when I saw the engine coming he was on the track. He didn't try to get across. He raised

on the track and kept jumping to this side and that and springing and turning on the track. When I saw the engine at 8th Street was when somebody yelled at me. I don't know how far the engine went after it struck me. The engine did not strike any part of my body; I got my bruises from the hydrant I was thrown against. The flagman of the train crew came to me first. The other man, a black man, came afterward. He didn't ask my for any statement. He simply said
64 "Come on, go with me to the hospital; you are injured." He didn't ask me for a statement. One of the men, I don't. know which one, said that they were not to blame. The man that said "Come on, go to the hospital, you are hurt" said to me "Is it at all our fault" and before I had a chance to reply to him one of the other men said "Sure it is your fault." I never answered him. I never told him anything. I never told him that the horse was trying to get to the stable. I never gave any statement other than that I was knocked down by an engine at the 9th Street crossing. I gave them the number of the engine. I don't know all of the crew. The only man I know is Pellage. The other man I met since. At the time of the injury I knew none of them whatsoever by name. It was not in my power to have them prosecuted in Colon. I didn't make a complaint against them; I had a right to make my complaint to the Panama Railroad Company where they were employed. I had no cause whatsoever to have a criminal charge against the employees of the Panama Railroad. I did not make a criminal charge; I held the Panama Railroad responsible. I didn't delay filing my suit from July 4, 1914, until July 3, 1915; I entered it with Mr. Todd, my attorney, from the 4th day of July, 1914. Mr. Todd had my suit in charge to file against the Panama Railroad Company. I don't know when he filed it. That is because I was down in the Hospital. Dr. Blake came to me on July 4, when I was home in bed. Dr. Blake treated me from July 4, 1914, until I went to Colon Hospital. I staid in Colon Hospital three days.

I could not possibly have fallen off a ladder before going to Colon Hospital, as I was lying in bed from some time in September. A man should be some where to fall from the ladder, unless he fell from it from the side of his bed. I didn't fall from a ladder. I made no such statement to the authorities at the Colon hospital. I could not talk. I made one statement at Ancon Hospital, but did not tell them that I fell off a ladder ten days before. I was taken from Ancon Hospital on the 15th of January, 1915. It is impossible that I should make a statement to the people of the Santo Tomas hospital that my trouble was due to an injury I had received two months before. I didn't make such a statement.

At this point, by agreement of counsel, Mr. S. W. HEALD, was called, and testified for the plaintiff as follows:

My name is S. W. Heald. I am Superintendent of the Panama Railroad. I have been Superintendent one year. I know the railroad track on Broadway in the city of Colon. The track belongs to the Panama Railroad Company. I have been engaged in the railroad business twenty-two years. I have been with the Chicago & Northwestern Railway about 14 years, and did all kinds of duties—brakeman, switchman, yardmaster, and conductor. I am familiar with the operation of engines and trains. I have been on the Isthmus eight years. Since coming to the Isthmus I have been yardmaster, terminal trainmaster, and superintendent. I have had experience in the handling and operation of trains on the Isthmus and am familiar with the working of an engine. I am acquainted with the railroad track along Broadway in Colon and between 3rd Street and 10th Street. I know what the conditions of that track would be on a rainy day. I know the engine in question, No. 253. It is the usual type of engine that we use all the time. This type weighs about 44 tons. If that engine was going along Broadway at the rate of 30 miles an hour it could be stopped in about

a half a block — perhaps sooner; it depends on conditions. When the track was slippery it could be stopped about that time, perhaps sooner if you dropped sand. If an engine was going 18 or 20 miles an hour you could stop it in three engine lengths. It is not possible to stop it in ten feet, not at that speed. You can stop an engine by turning or pulling the air cock, and you can do it from the front on the footboard by opening the hose.

65 An engine going at the rate of eighteen or twenty miles an hour on that wet track ought to stop in three or four engine lengths after the air cock is pulled. You could not stop it in ten feet nor in ten yards on a slippery track. If the engine was going at the rate of thirty miles an hour and struck a man on horseback on the track it would hardly push the horse on its feet for twenty-five feet; it would knock the horse down and run over him. If the engine was going at the rate of 18 or 20 miles an hour it would knock the horse down. From my familiarity with the operation of trains and my experience as a railroad man, I do not think it possible that an engine going eighteen or twenty miles an hour could push a horse twenty-five feet. It would knock him down and run over him if he was on the track. If he was off the track and it struck him on the hind quarters, it would knock him down anyway. I know Moorfoot. He was working for the Panama Railroad when I came in 1908. I had him under me and had occasion to observe his work. He is as good a colored engineer as we had. I have always found him a good careful man. The railroad company requires the colored men to familiarize themselves with the rules of the company. The rules require engines to ring bells going over crossings. Moorfoot is not an engineer now. I don't know what he is doing. I am not in touch with the yard men since leaving the position of yardmaster. He isn't employed as an engineer now— because we displaced all the colored engineer and put white men in their places. That was on account of the reduction in force. I know the other men Hines, Ellis and Stamp. Hines, Ellis and Stamp are as good as the ordinary men. Moorfoot's standing among the colored

railroad engineers of the Panama Railroad was as good as any. I know this man Pellage. The last I knew of him he was working for the railroad company. Of course, since I have been Superintendent I don't keep track of them. He worked for me for about five years when I was trainmaster, part of the time regular and part of the time off and on. At different times we would lay him off as occasion necessitated. Lots of times we would have conductors or foremen that would kick on having them and didn't want them, and we would take them off. I think one man is all I remember kicking on him. The off and on employment of Pellage was before July 4, 1914, long before that. I have been away from there about four years, and that was before I left.

Cross Examination.

The rules of the railroad company as to the rate of speed of engines in yard limits is ten miles an hour. Broadway, Colon, is within yard limits. If an engine were going up that track on Broadway at ten miles an hour and there was an ungovernable horse or broken down wagon on the track on the crossing at 9th St. there would be no excuse at all for the engine not stopping there. The engineer should have a good view ahead. If an engineer were proceeding at the rate of ten miles an hour he could stop in the distance of the engine's length. If a careful engineer saw a man going across the track and expected him to go across he might not attempt to stop at that time, but if he knew a thing was a fixture, if something was broken down or could not get off he certainly would. Same as a man driving a coach; he might think he could get over ahead of him and not try to stop. If the engine was going at the rate of 3½ miles an hour it could be stopped within fifteen feet. If an engine was going at the rate of 3½ miles an hour and struck a horse it would not knock the horse thirty feet or more. If an engine struck a horse, knocking him thirty feet over the top of a fire hydrant, the speed of the engine would depend on the lay of the ground. It is a little elevated at 9th Street

and it is hard to tell. It depends on how it happened to hit the horse. One time you might hit him and knock him ten feet and another time you might knock him twenty feet at the same speed. I don't believe that
66 an engine would knock the horse that far, by striking him in his hind end, from the north side of 9th Street clean across 9th Street against a hydrant and then clear across the hydrant ten or fifteen feet more over against a road roller.

Re-Direct Examination.

The engine would have to be going forty or fifty miles an hour to do that. If an engine going at the rate of 40 or 50 miles an hour, or 30 miles an hour, struck the horse on the hip, in my opinion it would have killed him, and the horse could not have picked himself up and walked away. There is a hedge along Broadway, and was put in there about three or four years ago. Pellage was not dismissed because he would not make a statement favorable to the Railroad.

Thereupon the testimony on behalf of the plaintiff was resumed.

DR. S. G. TAYLOR, having been called by the Court as an expert witness, by agreement of counsel, and having by order of the Court and with the consent of counsel previously examined plaintiff, testified as follows:

Counsel for the plaintiff requested the witness to explain some medical terms, in respect to which counsel was to examine him before giving his testimony to the jury. The witness explained the meaning of the terms as follows:

A trauma means a bruise; traumatic condition is also a bruise; bacillus is one of the forms of life usually described as rod shaped. There are forms of germs that are not bacilli. Tuberculosis is a disease that happens

to human beings or animals that are caused by tubercular bacilli. As to the percentage of human beings that have tubercular bacilli in their systems I would say that that is a rather broad question. Some authorities would give you a high percentage of men who at some past date had tuberculosis and probably recovered from it. Some of us may have it now; some may have the disease actually developed and others may have the germs lying dormant. It may be a fact that some medical authorities claim that eighty-five percent of the human beings have the germs lying latent in their systems, but I am not in a position to state that that is so. I don't remember having read the authorities. I have had some practical experience with tuberculosis—not a great deal. Tuberculosis attacks any part of the human body, usually the lungs is the most common place; but of course you can have it in peritoneum, or in a bone, or in a gland, or somewhere else, but the most common place is in the lungs. I have seen a few cases of tuberculosis of the gland or bone in developed form. I have handled a few cases of tuberculosis of the bone and tuberculosis of the lungs. I am acquainted with Joseph T. Toppin. I went down to see Mr. Toppin at the request of Mr. Bettelheim in the spring of 1915, and I might have seen him a second time after he had left Santo Tomas hospital. I don't remember if he told me about the injury or not. I don't think I went back far enough into his history. About fifteen or eighteen months past I went down to see a brother of Toppin's, which he said he was, and took some of his sputum, and he had tuberculosis and died the next day. Some of the best authorities will tell you that where one brother has tuberculosis the rest of the family are predisposed to tuberculosis, but it is a question I would not like to answer. I have made an examination of Toppin in the last three or four weeks by order of the Court. Toppin came over and I could find nothing in his chest or liver or spleen. I took some of his blood and sent it to Ancon for a Wasser-

67 man test. It proved negative. A tuberculin test made with Koch's Old tuberculin was positive for tuberculosis. It showed a

positive tubercular reaction: that is, a skin reaction. He had several scars over his body, one under his left scapula, where I take it he had a sub-scapular abcess; he had several scars, one about the tenth rib, one about the point of the coxis, one to the left about three inches above Poupart's ligament about here (Indicating lower part of belly) that I take it was the result of psoas abcesses opening in that direction. They will point anywhere. At the present time he has some swelling over his sacrum, the lower part of the backbone. There is a hard mass that in my judgment is caused by the action of the tubercular bacilli. I stuck a needle in there a few times, and could not find any pus. The only thing I got was a blood hemmorhage. I am sure at the present time that Toppin has a granular condition around that bone. It is simply nature trying to heal up the old bruises. That is the reason it bleeds so easy.

A psoas abcess is an abcess which originates around the lower vertabrae, usually the lumbar and sacral vertebrae, and points somewhere. It can point any way. Sometimes it points towards the leg and sometimes towards the coxis, and sometimes towards the belly. Of course they might be double or single. Most authorities consider them tubercular. It sooner or later becomes pussy. They are apt to be very slow in getting up to where they need surgical interference. If the abcess is contaminated, and it usually is when it comes to the surgeon, the patient will gradually bend forward. His leg will gradually favor that side and he will keep that leg bent. If you put him to bed and try to straighten it you will bend his back. If you have any pus forming germs you will have a high temperature, and all the indications of a pus somewhere around the body.

I am acquainted with Dr. Da Costa's work on surgery. I believe most people recognize him as an authority. I would follow Dr. Da Costa the same as I would any other author of a book. The men with a reputation as Murphy, Dr. Da Costa or any of those fellows is generally considered an authority on the subject they are writing in.

Counsel for plaintiff then read to Dr. Taylor from Da Costa's Modern Surgery, pages 223 and 224, as follows:

" Relation of Trauma to Tuberculosis. — (Inoculation Tuberculosis is discussed on page 218.) This question is often in dispute and has become of much medicolegal importance. Several times of late, in the Courts of Philadelphia, it has been the subject of acrimonious controversy. Suitors affirm the relationship, corporations deny it, and experts wrangle till judge and jurymen do not know what to believe.

"There can be no doubt that tuberculosis often becomes manifest in a part after that part has been subjected to traumatism. No one denies this. In fact, in over one-sixth of all cases of bone and joint tuberculosis traumatism is set down as casual.

"I do not mean that trauma causes the tissue changes characteristic of tuberculosis. Such changes are always and only produced by the action of tubercle bacilli. I do mean that the injury puts the parts in such a condition that the bacilli of tubercle attack the injured tissue, having been unable to attack it when it was in a state of health. The injury creates an area of least resistance. In such an area the cellular activities are no longer active or able to withstand the action of bacteria. Without an injury it is highly improbable that tuberculosis would ever have arisen in that part. At least the injury determined the localization and multiplication of bacilli and the origin of an active tuberculous focus, and to this extent the injury was casual.

"Osteomyelitis is due to pyogenic cocci. It
68 may arise in a bone subjected to traumatism. Traumatism is stated to be a cause. Why should a tuberculous process be placed in a different category? Where do the tubercle bacilli come from? Some maintain that if tuberculosis follows traumatism of a part there was a latent and undiscovered tuberculous process in the part before the accident, and that all the accident did was to light up a latent focus into activity; in other words, to precipitate an inevitable result. This

contention is true in some few cases; we believe it to be untrue in a large majority of cases.

"Some believe that though there may have been no local latent focus, there is, at least somewhere in the body an area of tuberculosis to furnish the bacilli. This view is true of many, but we do not believe of all cases. It gains in probability from the established fact that tuberculous bone or joint disease is most apt to arise in those known to have tuberculous infection somewhere about them. It is certain that in many cases there is no demonstrable focus of tubercle anywhere to be found except in the injured part. It is hard to prove a negative, and it is impossible in any case to deny arbitrarily that an unrecognizable distant latent focus may exist.

"We know, however, that many cases never give any sign of distant tuberculosis before the accident, and never give any sign of it afterward. We do know that bacilla can exist for a considerable time in blood or lymph when there is no demonstrative lesion of tuberculosis. From such blood or lymph bacilli may be deposited in the injured part and become active for harm.

"We do know that bacilli may live for a long time in glands or bone-marrow without producing any evidence of a lesion of bone or of gland (Petrow, Lannelongue). If bone-marrow or gland containing bacilli is injured, these bacilli become active and establish an area of disease. Without the injury it is improbable that there would have been disease."

Counsel for plaintiff asked the witness if he had read the foregoing, and if so, did he as a physician believe that to be true. The witness replied: "Well, my personal experience is limited. From what I read and gather from literature I believe it is true."

Counsel for plaintiff then said to witness: "I would like read to you this section:"

"Local tuberculosis follows slight rather than severe injury. I have seen it after a strain of an epiphysis,

never after a fracture. I have seen it after a sprain of a joint, never after a dislocation. After a severe injury tissue reaction is so marked that bacilli are destroyed. It is praticularly in bone and joint tuberculosis that traumatism is held to be casual. — Whitman tells us that out of nearly 3400 cases occurring in the clinics of Bruns. Koeniz, Mikulicz, and Hilderbrand over 500 were attributed to trauma. I have seen a number of such cases, most of them involving the knee, foot, or wrist. I have seen tuberculosis of the glands of the groin after a bruise, tuberculous pleuritis and tuberculosis of the chest-wall follow a chest contusion, and sacro-iliac tuberculosis follow a sprain. Tuberculous meningitis has followed head injury. I have seen several cases of tuberculosis of the testicle after contusion. When injury is followed by a tuberculous lesion, the definite signs and symptoms of that lesion do not appear for from three to six weeks after the accident. We may conclude that tuberculosis may arise at the seat of an injury; that in some cases there may have been an antecedent lesion at that point; in some cases there is a distant active lesion; in some cases a distant latent lesion; in some cases the bacilli must have been lying inactive in the part or must have lodged there from blood or lymph, after the accident and because of it. R. L. Dixon reported a number of cases (Physician and Surgeon," Jan., 1909). Hueter and Schuller insist on the tendency of trauma to localize tuberculosis. Ribera Y Sans (Quoted in "Practical Medicine Series," vol. in Surgery, 1912, edited by John B. Murphy) states that in 45 per cent of cases of tuberculosis of the larger joints the condition is preceded by trauma. In an appended note by Murphy we learn that that surgeon believes that tubercle bacilli tend to escape from the circulation at the site of a slight trauma and to light up the disease. Bosanquet ("Lancet", Jan. 13, 1912) says that in expressing an opinion "as to the probability of a tubercular lesion being due to a preceding accident, I think we must put disease of the joints in a class by itself. There is a considerable mass of evidence, that in some way or other injury does lead to tubercular arth-

69

ritis, and if the occurrence of the accident is clearly established and it is followed at a reasonable interval by the tuberculosis, we may accept the casual connection as probable." He regards a "reasonable period of time" as not over three months. During the interval there should be some pain or stiffness of the joint.

Counsel for plaintiff then asked the witness: "Do you agree in that view?"

The witness replied: "As long as we consider Da Costa one of our best authors, I must recognize his literature along with others written up."

The witness was then asked by plaintiff's counsel if he was acquainted with Warren-Gould's international text book on surgery. He replied that he was, but that it was an older book, and added: "I don't believe it would be as good a text book on modern surgery, or as good a guide to follow, although there are some very good men that have written in Warren-Gould's international text book." Plaintiff's counsel read an article on tuberculosis of the joints and asked the witness if he agreed with the article. The article reads as follows:

"As regards the etiology of these cases the ultimate cause is the tubercle bacillus, but the localization of the disease in a bone is very often brought about by the occurrence of some slight injury. These cases occur equally in children and young adults, the tendency to tuberculous deposits in the bone being greater in children, while in adults tuberculous perostitis is more common." (Pages 687 and 688.)

"Bacillary infection may occur from without, leaving no trace of local infection at the atrium, or from within through the blook-vessels. Lodgement of these mirco-organisms having occurred in or near the joint in a healthy indivudual, the invaders are overpowered by the defenders, and no injury results. Under the weakness of slight injury, however, or from inherent cell-weakness, this defensive power having been temporarily or permanently lost, a foot hold is gained and the point of attack is fortified.

A tubercular nodule is the result. Garrisoned on this vantage ground, the bacilli or their spores lurk
70 prepared to renew the assault at any near or remote moment when the defenders are off duty or are engaged in repelling other invaders, or when their relative powers are lessened by traumatism, by fever, or by other cause." (Page 713.)

And the witness replied that he takes what the different writers say on these subjects.

The witness stated that he was acquainted with the work "Principles and Practice of Surgery", and would accept it as an authority, the same as he would Da Costa and Warren-Gould, although the witness thought that probably Da Costa was a little more modern.

Plaintiff's counsel then reads from the book:

"Injuries are more important in determin ng the location of the tuberculous process, slight injuries, as sprains and contusions, being more apt to be followed by the disease than injuries of a more severe character, as fractures." (Page 168.)

Counsel for the plaintiff then asked the witness: "Do you agree with that view?"

The witness replied: "Most of the test books I get on tuberculosis of the bone put down some slight njury as being the cause. Some say at the end of three months you can trace it back to the injury. Da Costa says that tuberculosis is apt to follow a slight injury more than it would a severe injury. He makes the explanation that probably nature sends a stronger force to take care of the wound in a severe injury. It sends a stronger force out to heal this wound than it would in a slight injury. Da Costa is the only one I can find anything like that in.

"I am acquainted with the writings of Dr. John T. Murphy. During his life time he was probably one of the greatest men in the country on bone conditions, especially surgery of bones."

Plaintiff's counsel then reads from pages 993 to 997 of Murphy's Clinics:

"The patient, a male aged thirty-three, was admitted to hospital September 5, 1914. The family history revealed that one sister died of pulmonary tuberculosis. The past history was negative.

"The present condition began twelve years ago, in 1904, in a slight injury to the inner side of the left knee. The patient kicked a brace of the door with the left leg, kicking inwardly in the direction of the right leg. In this action he knocked the knee against the door. There was severe pain lasting less than a minute, and then becoming insignificant. He could flex the knee and extend
71 it as before the injury and without pain.

"Three or four weeks after the injury he noticed a swelling, uniform in shape, appear at about the site of the injury and gradually increase in size. There was no pain except when he stumbled or jumped upon the left foot. He had no chill preceding the appearance of the swelling and does not recall having had fever.

"His condition continued about the same until three months later, when he noticed that the swelling was not diminishing and that the knee felt weaker, the weakness causing him to stumble at different intervals. Four months after the accident, while riding a bicycle, ho noticed that, as the left pedal of the wheel went down, his foot did not follow it the whole way; it was evident that the knee could not be bent as much as before. He still had no pain. * * * * * * * * * * * *

"But the inspection of the skiagrams does not tell you what is the matter with the patient—the history tells you what is really the matter. He went to kick a brace of the door and developed pain of such severity that he fell down and was immediately incapacitated momentarily. In a few days the whole trouble passed away, and he felt perfectly well. Three or four weeks later the knee began to swell. Three months later the swelling was still present, and the knee felt weaker, giving way at intervals. Motion

became more and more restricted until, finally, he could not use the limb. There were periods of exacerbation and improvement, but the improvement was never sufficient to repair fully the damage done by the last attack. There was fever when the motion began to be restricted. He has not lost weight, but on the contrary has gained 15 pounds within the last six months.

"The story makes the diagnosis, and infection of a joint, of any other origin than tuberculosis, incapacitates the patient within forty-eight hours. A joint tuberculosis never incapacitates an adult before the end of three and one-half or four weeks. That is the rule."

The witness, in reply to plaintiff's counsel, states Dr. Osler is considered an authority in his branch of medicine among medical men. I studied Dr. Ossler at College.

Plaintiff's counsel than reads from page 270 of Osler's Practice of Medicine:

"Trauma.—The relation of injury to tuberculosis is well known. A blow upon the chest may cause a pulmonary or pleural tuberculosis; injury to the knee, a tuberculous arthritis; a blow on the head, tuberculous meningitis. Probably in these cases the injured part part is for a time locus minoris resistentiae, and if bacilli are present they may receive a stimulus to growth or under the altered conditions become capable of multiplying. Mendelsohn reports 9 cases in which, without fracture of the rib or laceration the the lung, tuberculosis developed shortly after contusion of the chest."

Witness, when asked if he agreed with the statement in the book replied: "Not having sufficient experience personally, I am bound to accept that kind of literature.

72 Plaintiff's counsel then put the following hypothetical question to the witness:

"Doctor, you have heard all the testimony today. You have heard all of it, I believe you were here from the

beginning of the case. If it were true that Joseph T. Toppin received a slight injury, less than a fracture, by being struck by an engine and thrown against a hydrant on July 4, 1914; if thereafter he suffered from the bruises and later on in about three months his left leg began to be drawn up; and if he were in bed three months thereafter and then went to Ancon Hospital and was found to be suffering from tuberculosis of the bone; and if you have found that his family is suffering from tuberculosis; would you not say that the accident on the 4th of July, 1914, was the cause of his present condition?"

To this the witness replied:

"If I would have known his condition before I could be more positive. It is possible that he had a psoas abcess there in a dormant condition or it may have been active, and it is possible that at this time it started up. On the other hand, not having that, I am not able to prove in my mind that the abcess was not there to start with, neither am I able to prove that it was there in my own mind. Under the circumstances I would state that the traum is the possible cause of Toppin's abcesses. On the other hand Toppin might have had the abcess, but as we all know, a psoas abcess may stay in a place and remain dormant."

Counsel for the plaintiff continued to question the witness, and received the following answers:

(Question) "If a psoas abcess were dormant and a man received an injury, would that injury be liable to start up the abcess?"

(Answer) "Yes, sir."

(Question) "If a man had tubercular bacilli anywhere in his body and had an injury, would that be liable to result in abcesses?"

(Answer) "From the literature that I have been able to gather I would say yes. Most of our big men say that it would be possible for an injury to start up an abcess."

(Question) "It would be impossible, Doctor, as I take it from you, for any doctor to answer positively under

oath that the injury was the cause of Toppin's present condition?"

(Answer) "I would not say altogether. Probably some of the older men who have had a vast experience in bone surgery and have followed up the history for several years back of the injury like Murphy or Da Costa, they would possibly be able to answer that question yes or no. But I consider that a man without that experience either personal or having been able to live around those clinics five or ten years, I think he would probably give you what other people say about it."

Cross Examination.

Counsel for the defendant, addressing the witness, said:

"Referring back to Da Costa, I find that he says on page 224 of his book that was read to you by plaintiff's counsel:

73 "There is a considerable mass of evidence, that in some way or other injury does lead to tubercular arthritis, and if the occurrence of the accident is clearly established and it is followed at a reasonable interval by the tuberculosis, we may accept the casual connection as probable. He (referring to Ribera Y. Sans, quoted in Practical Medicine Series, Vol. in Surgery, 1912, edited by John B. Murphy) regards 'a reasonable period of time' as not over three months. During the interval there should have been some pain in or stiffness of the joint."

"Do you agree with that theory of his?"

(Answer) "Yes, sir."

(Questioned by counsel for defendant):

"Now, isn't it a fact that the classis period is considered six weeks?"

(Answer) "Well, literature comes along that same line that says in the first six or eight weeks, and others say in about three months. I don't think that is Da Costa's own idea; I think he is quoting it."

(Counsel for Defendant):

"But among medical men a period of six weeks is considered classic?"

(Answer) "Symptoms should show in six weeks."

(Counsel for Defendant):

"Do you know whether this man received any other injury since July, 1914?"

(Answer) "I know very little about the man. I don't know. He might have come to me, but I never have a fixed hour Sundays or holidays in the afternoon, so he didn't find me."

(Counsel for Defendant):

"If he didn't develop any symptoms until three months after the accident, would you be willing to state as a physician that that injury caused the psoas abcess?"

(Answer) "Well, if he didn't show some symptoms in three months, no. If he didn't have symptoms of having trouble there I would not say that the injury caused it. I am staking my judgment on what I read, not on my personal experience."

(Counsel for Defendant):

"Suppose he had some injury three or four months after July 4, 1914, could those psoas abcesses have resulted from that subsequent injury?"

(Answer) "Certainly. You mean to ask me had Toppin had any other injury after the 4th of July, could he have developed the same condition?"

(Counsel for Defendant):

"Yes."

(Answer) "Yes, sir."

(Testimony of witness continued in narrative form.) If the tubercular condition developed after three months most likely the condition was not produced by the injury resulting from the collision. If he went three months without symptoms and then developed psoas abcesses,

from what I have been able to gather from medical authorities I would say the injuries received on July 4, 1914, would not have caused it. I first saw Toppin some time in April, about the first. I would not be positive about the date; after he had come from Santo Tomas Hospital. He had some incisions that were draining pus, and from the looks of it I told him that I thought he had had a psoas abcess and that they had opened it. I made a thorough examination of Toppin recently, under
74 orders of the Court. As to the condition I found him in, and as to his capacity to do work of any kind, I would say that is a hard question. It depends a great deal on what this granulated condition that he has about the spine will do. His temperature is normal. The temperature usually shows in the afternoon, so I have had him come in the afternoon several consecutive days, and it was normal. Then he has some growth over his sacrum. I stuck a needle in it several times, and I could get nothing but blood, so from that I would say that he has a granular condition of the bone of the lower vertebrae. I cannot say how many of them are involved. The abcess is pretty well cleaned up, but I think undoubtedly there is a tubercular condition growing there. As to the formation being removed by an operation, I would say you can probably open it up and scrape it. It is worth trying to open it up and clean all the tissue out of there and pack it and try to make it heal from the bottom, but those big nerves come out there and I don't know whether it would be successful. As to his condition now about being able to work, I think he would be able to do a certain amount of work. I don't know how much that ought to incapacitate him, but he ought to be able to do a certain amount of work if he would sit down when he had a chance, that is in saloon work. It is hard to say just how much bone damage has been done there. From my examination of him I do not know whether he had tubercular germs at the time of the injury. I don't suppose anybody could say that he had or had not at the time of the injury. I would not say that he did or that he did not. He might

have had a dormant abcess. Sometimes you will find these abcesses that his own resistance is able to close up, and if nature closes it up it will stay there and won't spread; and he might have had that before the injury and the injury could have broken the capsule. It is possible that he did have tubercular germs before the injury, and it is possible that he did not. I cannot say yes or no. I examined him for syphilis. I took a sample. I don't know Dr. Blake. I used to see his sign on Mount Hope road.

Re-Direct Examination.

As to whether another operation is necessary in order to cure Toppin up, I would say that is a question. I think probably in time Toppin will have to have another operation. I think probably in time that that place will become pussy, and it may get out on the other hand if his resistance is good and if he takes good care of himself. For instance, if he will go to some good climate where he will get the best of food and the best climatic conditions he might outgrow that trouble. I don't think Dr. Earhart made an examination of Toppin within the last two or three weeks. Dr. Earhart was over to see me, but he didn't have time to examine him. Toppin happened to be there that morning, and I asked him to look at it and he stuck a needle in it and he thought he would find an abcess. He didn't have but a minute though, and didn't have time to look him over and then he went to catch the train. I don't suppose Dr. Earhart spent two minutes altogether. I could not say as to whether Dr. Earhart expressed any opinion as to whether he considered an operation necessary. I think he remarked that if it was laid open and cleaned out it would get well.

In reply to the question as to whether witness thought that in view of Toppin's condition, if he has tuberculosis of the vertebrae, would he consider him a cripple, the witness said:

"Why, after damage is done to bone it is pretty
75 hard to ever have it repaired. Of course, you may cure the condition, but the deformity will always be there. Like for instance, a hunchback. Most of them are tubercular, and maybe you will see one where some bone has been destroyed. Possibly the process is not active anymore, but the bone doubles back and leaves him a hunch-back. To that extent he is cured, but the deformity is there." (Dr. Taylor at this point showed the Ex Ray plates to the jury and explained the honeycombed condition of the bone, due to tubercular bacilli.)

As to whether Toppin's life has been shortened on account of the condition he is now in I would say if he didn't die of tuberculosis that is a hard question. He might have died of tuberculosis whether he received those injuries or not. It is hard to say whether this injury was going to shorten his life or not. Most people consider when they get tuberculosis that they are pretty well finished. Of course, a good many people get well that never knew they had tuberculosis. I would not say that that would hold true if the tuberculosis would attack the bone. I think there is probably as many cases of bone tuberculosis that get well as any other kind. As a rule bone tuberculosis is a local condition, and if you relieve that condition, if you can take it out altogether, a man has a chance to get rid of it and live his natural life with the deformity. As to what operation would be necessary to relieve Toppin's case, I would say you could open the abcess and drain it, and you might take some out by the spinus process.

DR. F. S. MEBANE, witness for the defendant, testified as follows:

My name is F. S. Mebane; I am a physician and surgeon by profession; I am resident physician at Santo Tomas hospital in Panama City; I am at present in charge of the surgical work there. Dr. Boyd is in the States. I was at Santo Tomas Hospital in January, 1915. I know

the plaintiff, Toppin. He was transferred to Santo Tomas from Ancon Hospital while I was there. I was in charge at the time. I had charge of his case. I made a record of his case. (Record shown to witness.) Yes, that is a copy of the record. It contains a history of his case as it was when he was admitted.

Counsel for the defendant then said:

"I find that the record contains the following statement. It shows that he entered the hospital on January 15, 1915, and left the hospital on February 19, 1915. His record also states that he was transferred from Ancon Hospital where he was operated on for psoas abcesses drained from his abdomen, and several smaller abcesses. Dates trouble from an injury two months ago. Is that correct ? "

(Answer:) " I don't remember now what statement he made, but that is what I wrote at the time he was admitted."

(Narrative of witness's testimony continued.) I don't remember his condition when he was released from the hospital. That has been too far back. The record here indicates that he was in a condition that he could leave the hospital and be treated in his home. The record is made from data that I furnished from attendance on him.

Cross Examination.

I don't remember whether they sent over from Ancon Hospital Toppin's record. It is not an invariable rule for them to do so unless they are requested. There is a possibility of a mistake in the statement that his injury was due to an injury received two months previous. There is a possibility of his condition being such that his statement was not reliable. I made the record myself. It is in my own hand writing. The term "stafula cocus" is one of the pus producing germs, and that
76 is tubercular germs.

MR. OHLSEN, chief clerk of the Ancon Hospital, was duly sworn as a witness for the defendant, and testified as follows:

Mr. Ohlsen's testimony related to the identification of the Ex Ray plates and the file card, which gave the name of the plaintiff as Joseph T. Toppin. The Ex Ray picture was taken on April 7, 1917, and the diagnosis was "possible T. B. fracture of the spine."

Cross Examination.

(Questioned by Mr. MacIntyre:)

Q. Are those the original records of Ancon Hospital?

A. This s the original record of Ancon Hospital.

Q. Is this the original record of Co on Hospital?

A. Yes, sir.

Q. Are there true copies of these records in Court?

A. A true copy of the chart of Joseph Toppin was made while he was in Ancon Hospital.

Q. Have you the correspondence in reference to the Toppin case?

A. I have.

Q. Would you read that to the jury?

Witness reads letters as follows:

"Colon, R. P., October 19, 1916.

"Supt. Ancon Hospital,
Ancon, Canal Zone.

"Dear Sir:

I had been admitted to Ancon Hospital on a transfer from the then Colon Hospital on December 27, 1914, suffering fron injuries sustained in Colon. I was later transferred to San Tomas Hospital, sometime during January 1915.

"I now respectfully solicit of you a copy of the report or diagnosis made in my case. In anticipation of the favor, I beg to offer my thanks in advance.

Yours respectfully,
(Signed) J. T. TOPPIN"

"Ancon Hospital,
Ancon, Canal Zone, October 24, 1916.

"Jos. T. Toppin
Cristobal, C. Z.

"Sir:

Replying to your letter of October 19, the records of this Hospital show that you were admitted December 27, 1914, and upon your own request transferred to Santo Tomas Hospital January 15, 1915; diagnosis — multiple abcesses, illness. The chart does not indicate that your illness had any connection with the injury alleged to have been sustained in Colon on July 4, 1914.

Respectfully,
(Signed) ALBERT E. TRUBY,
Superintendent."

77 "Cristobal, C. Z., October 27, 1916.

"Supt. Ancon Hospital,
Ancon, C. Z.

"Dear Sir:

Yours of October 24, replying to my letter of October 19, came safe to hand. I beg to inform you that your reply is in no way in connection with the proper statement, at my request, of a copy of my chart, which I have asked of you to be forwarded to me.

"Now I respectfully solicit of you, an entire proper copy of my chart made upon my admittance to Ancon Hospital, on the 27th day of December, 1914, as an endipendant pation, until I were transferred at my own request to san Tomas Hospital on January 15, 1915, I did not ask for a statement of injuries sustained on July 4, 1914. The Courts of the C. Z. and not the hospital authorities are the judges of such matters.

"Again thanking you in advance for same I am,
Respectfully. yours,
(Signed) J. T. TOPPIN."

"Ancon Hospital,

November 4, 1916.

"Mr. J. T. Toppin,
Cristobal, C. Z.
"Sir:

In reply to your letter of October 27th, you are advised that the records you request can not be furnished.

Respectfully,
(Signed) ALBERT E. TRUBY,
Superintendent."

The witness was then asked to read the Ancon hospital record and also the Colon hospital record, which he did as follows:

"Ancon Hospital Record.

"Joseph Topping; case No. 170360; ward 8; class 7; admitted December 27, 1914; discharged January 15, 1915; place of birth Barbadoes; occupation saloon keeper; age 26 years; residence Hudson Lane and 11th Sts., Colon; black; in Isthmus nine years; diagnosis, multiple abcesses; special report, illness; claimant's description of accident on admission (give location and dates), July 4, 1914, struck by a train in Colon and had pain in (L) hip for one month. Then was alright until the first part of Dec. when he began to have pain in his hip (L) and
78 walked with a limp. Since the middle of the present month abcesses of forearm, arm, and back have developed; physical examination, Patient lies with (L) thigh flexed and abducted. Cannot extend left leg. Fluctuation over left hip above and to the inner side of great trochanter. Abcesses in (L) scapular region, middle of chest and axillary line in upper third of arm and about middle of forearm (L). No tenderness of spine except in lumbar region. No deformity of spine, but may be abcess in lower lumbar region. Moist rales in chest, especially on (R) side posteriorily. Vocal fre-fremitis increased on that side."

"Colon Hospital Record.

"Joseph Toppin; case No. 51844; Ward B; Bed 17; birthplace Barbadoes; age 26; colored; male; married; pay patient; occupation sa'oon keeper; on Isthmus nine years; name of nearest relative or friend Sinclari Toppin; address of relative or friend, Hudson Land and 11th Sts., Colon; admitted to Colon Hospital 12-24-1914, transferred to Ancon Hospital Dec. 27, 1914; diagnosis left psoas abcess, left scapular abcess, improved condition. Special report reads 'no fault', in July fell from ladder onto hydrant, striking left hip and small of back. Ten days ago pain which has continued. Since then have been very severe with temperature; physical examination, heart negative; lungs negative; left hip and lower lumbar region very tender and painful. Some fluctuation above great trochanter. Limitation of motion."

MR. S. BETTLEHEIM, witness for the plaintiff, testified as follows:

My name is S. Bettleheim. I am in the wholesale liquor business and have been engaged in that business five years. I know Joseph Toppin; I know the cantina he had prior to April 30, 1915. I sold liquors to Toppin.

79 Prior to July 4, 1914, Toppin's bill with me was $250 to $300 Gold a month, without what he bought for cash. We did a credit business. His cash business in a month was $80, $90, or $100. He bought about $300 to $350 of stuff from me a month. I was not the only one he bought from. I told him I would like it better if he would buy from me. When I came into the cantina I saw bottles from other people. He sold beer in bottles. Toppin also sold draft beer. He didn't buy the beer from me. I don't know how much beer he bought. If Toppin sold off what he purchased from me at retail he could make 50% profit. If he sold it in bottles he made 35 or 40 per cent profit. I know the time when Toppin got hurt. Toppin's bill fell off a big amount

because afterward he could not do any business, and I went over there and looked every day what was go'ng on, and when he needed more stuff, and after he was hurt I didn't give him any credit. Down to about the time of the fire I should say that he bought from me $150.00 Gold a month when the other man was in the bar, that is what he bought from day to day. I had to advance money to pay the license. I had to loan him more money later on. He was broke.

Cross Examination.

Toppin doesn't owe me any money now. I have no interest in his saloon business.

The Plaintiff here rested.

The Defendant, to support the issues herein in its behalf, introduced the following testimony:

MARTIN B. CONNOLLY testified for the defense as follows:

My name is Martin B. Connolly. I am roadmaster of the Panama Railroad Company. I have had forty years experience in the railroad business and here. I know Moorfoot, the man who was the engineer in charge of the engine which collided with Toppin's horse well. I don't know that he was on the engine at the time, but I know him well. I have known him for fifteen or sixteen years on the Panama Railroad. He worked for me at the Gamboa Gravel Pit before the Canal started, and afterwards. During the construction of the Relocation of the Panama Railroad he worked for me during the whole time, until the colored engineers were taken off the engines. I had occasion to observe his efficiency as a railroad engineer. He is a good steady cautious man, so much so that when we wanted a man for a particular job (colored men were sent to us in those days) I always asked for Moorfoot,

because I considered him reliable. During the fifteen years that I knew him he always stood well with everybody. He was sober and reliable. I didn't see him after he worked in the switch yard. I don't know anything about that accident. I don't know that he was on the engine at the time. I don't know the other men who composed the crew—Curtis, Hines, Stamp and Ellis, except by sight, but I know Moorfoot well. He is a very good reliable man, and I always asked for him when I wanted a man. Each dry season we took gravel out of Matachin gravel pit, and on different occasions Moorfoot worked for me, and during all the time of the Relocation work until they took the colored men off he worked for me. I don't think a train ever ran thirty miles an hour on "E" Street. It is possible, but I never saw anything near that speed. If a horse was struck by a train running thirty miles an hour it would knock him down and kill him. If he was on the track, of course, it would run over him, but if he was on the side it would not run over him, but would push him to one side. If a pilot is on the engine it would throw him in the air, but on the switch engines there is only a buffer, and that would throw him
80 under and run over him. If the right hand corner hit the horse, the flagman could not, by standing on the clyinder box, escape being knocked against the horse, unless he crawled on top of the buffer. I mean by the buffer, the big beam on the front of the bumper that the men stand on to light the lamps or put the flags on, just in front of the cylinders. It is from there that the pilot is hung, and it is from there that the step on a switch engine is hung. There is a step in front of the pilot on a switch engine. A man standing on that step could save himself by getting on the buffer. The heighth of the buffer is one foot above the rail. He could get on the cylinder box and clear by crawling on to the cylinder box and then on to the running board and from there into the engineer's cab. The cylinder is above the buffer, a trifle. As a rule it is just about even. The cylinder itself is about even with the buffer. Above that is the steam chest. The intake that lets in and out steam

is above that, and from there on to the foot-board running to the engineer. With a train running at the rate of thirty miles an hour on that rainy day, with a light engine and a wet rail he would probably go the length of one of those blocks before it could be stopped. They are about 300 feet apart. I do not think it possible for a man to stop a light engine in ten feet or ten yards under those circumstances. If a light engine was going eighteen or twenty miles an hour and the air cock was pulled out it would slide, and an engine would go further if she were sliding than if the brakes were holding. If the air is applied in the manner mentioned the engine would be more likely to slide and run a greater distance. The angle cock puts on the air in full emergency, and an engine on a wet track, going at the rate of thirty miles an hour under those circumstances would slide, and it would go nearly from one block to the other. It all depends on circumstances. There is very often mud on the track. There are very often things on the track that makes stops worse than others. If an engineer drops sand, that helps him to stop. An engineer not looking out for a thing like this, or a man opening the cock and throwing on the air, the engineer would not be looking for it and in that case the engine might go farther than if he were making the stop himself. I don't think you could stop in ten or twenty yards, if an engine is going eighteen or twenty miles an hour, and you could not stop it in sixty feet. The average distance of a stop for an engine going eighteen or twenty miles an hour is 150 feet. If an engineer is looking out for it and wants to make a good stop he might do better than that, but the chances are against him. If he drops said rightaway he can make a quicker stop. It depends entirely on the man and the condition of the rail.

Cross Examination.

Speaking from my experience as a railroad man, I do not think I could say yes to the question that I have known frequently reliable and careful engineers to have accidents happen that were attributable to their negligence.

As a rule a good man is a good man all the time. There are accidents that happen from something entirely out of his control, that he is not accountabble for. As a rule a good man comes pretty clear in accidents. If an engineer were looking out, and a flagman sitting on the buffer gave him a stop signal at 8th Street, and the engine was going 16, 18 or 20 miles an hour, the engineer could have stopped before reaching 9th Street, according to my judgment. If the engine were going 3½ to 6 miles an hour it could be stopped in the length of the engine, 25 to 30 feet. If the engine were going as high as ten miles an hour the engineer could stop it within its own length. Of course a man has to be looking out for those things, and an engineer is supposed to be looking out for those things. That is what he is paid for, and especially when he is on a public street. There are particular rules as to speed within yard limits.

81

THOMAS W. MOORFOOT, for the defendant, testified as follows:

My name is Thomas W. Moorfoot. I am fireman now for the Panama Railroad. I have been working for the Panama Railroad from 1905 to now, continuously, without any break in my service. I fired over the road for six months and I was promoted as an engineer in July, 1905, and November 1914, I was taken off on account of being replaced by white men. I was replaced by a white man because there was a law or something that no colored man should run an engine, but I was retained as fireman. I have been discharging my duties as fireman in the yard. My engines operated on dock 8 in 1914, and ran at night. I am now at Toro Point. I operated an engine on Broadway on July 4, 1914, as engineer. The rest of the crew were Ellis, foreman; Hines, fireman; and three brakemen, Curtis, Stamp, and Pellage. On July 4, 1914, we went down Broadway to the Radio Station, and performed some duties. The switch foreman generally gets the orders; I don't know what they were. In coming back it was

raining heavily, and approaching 9th Street crossing, just approaching the crossing, I saw a horse coming up the street. I saw he was unmanageable and tried to but over the track. I caught my brake and it looked to me as though it was not going to stop and before I could bring my engine to a full stop I struck the horse's hind leg and shoved him down. The horse fell down and the rider got off and ran over to the sidewalk. The horse got up and followed him over to the pavement. The foreman got off the engine, and by this time the front of the engine was just across the crossing, the engine and the middle of the tender was. I was facing the horse and the rider when I hit it. After the horse was struck the engine and the middle of the tank was across the crossing when I stopped. The horse was struck on the other side of the crossing, and he fell r'ght over to the other side. When I stopped the engine the tank of the engine was half way over the crossing. I don't know how many feet that is. The fireman was ringing the bell. The engine was going about four or five miles an hour. I don't believe that that is too slow. I don't operate the engine faster than that on Broadway. We were going between four and five miles, because when I saw the horse and applied my brake when I struck the horse the engine went over the crossing and part of the tender. The horse was galloping and he wanted to get across, and the man tried to stop him and the horse swerved out, and if the man would not have tried to stop him the horse would not have got in contact with the engine on the middle of the track. Pellage was not standing up at all. He was sitting down on the buffer beam. He didn't give me any signal. There was no reason for him to give me a signal, because he couldn't see as much as I did until he got up to the crossing. His statement is not true that I was wiping my hands on a piece of waste.

No Cross examination by plaintiff's counsel.

THOMAS HINES, testified for the defense as follows:

My name is Thomas Hines and I work for the Panama Railroad Company. I have been working for the railroad ten years as fireman. I work on the switch engines in Colon. I have been working there all the time. I was fireman on the engine in question on July 4, 1914. We have been on Broadway at different times. I don't know why we were on Broadway on that day. As a matter of fact, a fireman don't know why he is going anywhere. I have never gone to a horse race since
82 I have been in this country. I didn't see what happened. Just as we reached 9th Street the engineer stopped, and I said "What is it, Moorfoot" and I came off my side and came on his side, and I saw a horse on the ground and I saw there was an accident and the horse got up and went over to the side track and the man went before the horse. I came out of the engine to see what was wrong. When I came out I heard the rider of the horse say to Ellis "Boy, it is none of your fault, it is none of your fault, the horse was unmanageable. He was nearing the stable and wanted to get out of the rain." The bell was ringing. I have to do nothing but ring the bell, especially on Broadway. It is such a commotion place, and you must use the bell and sometimes you must use your mouth. They get so accustomed to the bell. I was ringing the bell. The engine cleared the 9th Street crossing, but not the tender. The engine was going about four or five miles an hour. In fact, you cannot run faster than that there. It is such a commotion place. It is so many cross streets and so many people you cannot go fast; it is impossible.

Cross Examination.

I made a statement to the Panama Railroad Yardmaster. I don't know whether the rest of the crew made a statement. As a rule the engineer and the foreman make statements. I don't know whether they made statements. I don't know whether my statement was the same as any of the statements.

Re-Direct Examination.

I know this man Pellage. He worked off and on before the accident.

HUBERT ELLIS testified for the defendant, as follows:

My name is Hubert Ellis. I am a brakeman for the Panama Railroad. About two years and a half ago we were taken off the jobs as conductors and engineers on account of taking white men on. I was not reduced for any fault. I have been working for the railroad eight years continuously, without a break in my service, around Colon, Mount Hope, and around the yard. I know Pellage. He and I are not friendly. After this case he was working along with us and after he got off the job he accused me wrongfully about some money, and I was taken to jail. We didn't have a fight. We were both fined, but I was fined a little more than he. We were both fined because the statement I made the night before I spoke the truth and they found him out and also fined him something too. We were not gambling. I just knew the man as a friend in a bar, and we were just running a little joke and he accused me of stealing money. Pellage feels unfriendly toward me. I was conductor on July 4, 1914, on the same engine that Moorfoot operated. I was on the engine at the time of the accident. We were sent down to the Radio Station to do some switching there on July 4, 1914, and on returning at 9th Street going south Mr. Toppin came across with a race horse and on account of the speed he was going he was unable to check the horse, although he tried to do so. The engineer was watching the actions and he saw that the horse could not stop, and he tried to shift around and the both of them met on the crossing and the head of the engine struck the hind feet of the horse. The rider got up and went over to the side walk and I went over to him to investigate the matter and I don't know whether it was fright, but he related that it was not the fault of the engine crew, but the horse. It was a race horse and he

was spirited and he could not check him and he wanted to go over the crossing to the stable. The bell was ringing. The head of the engine was just about the middle of the crossing when the air was applied, and the full body of the engine and tender were just over the crossing when he stopped. That would not be more than ten
83 or twelve feet. The engine was over the crossing, but the tender was on the crossing. The head of the engine traveled about an engine length. It was on the middle of the crossing when it hit the horse. As far as I can remember, the engine was not going more than four or five miles an hour. I made a statement to the yardmaster, because I was the conductor on the job. I made the statement immediately. (Statement was shown to the witness and he identified it as his statement.)

Statement is as follows:

"Colon, July 4, 1914.

"Mr. E. S. Waid,
Terminal Trainmaster.
Dear Sir:

In regard to the accident occurred on Fourth of July on Broadway and 9th St. Crossing. As I mention in my accident report form before I was coming from Radio Station with engine 253 over the crossing of 9th Street about 4 mile an hour. J. C. Toppin, the owner of one horse was riding across the road the same time. I was on the hind end felt the engine come to a stop and I came off to find out what was wrong, seeing a horse first rising up to go across the street with a limp walking. So I went over to the other side of the road to find out from the rider how the accident occurred. He say that he was coming across the street. Seieng the engine coming up he tried to check the horse but it wou d not check, knowing that the stable is over on the other side of street. So it is not the fault of the engine.

Yours truly,
Condr. H. ELLIS,
Engr. THOS. MOORFOOT."

Accident report was read to the witness, who said the report was made to the yardmaster, Mr. Waid. Report is as follows:

"Isthmian Canal Commission,
Panama Railroad Company.
Report of Accidents to Trains.
July 4, 1914.

"Place, Broadway and 9 St., Colon; Time, 3:45 P. M.; Date, 7/4/14; Eng. 253; Engr. T. W. Moorfoot; Condr. H. Ellis; Trainman, C. Stamp; Flagman, Geo. Curtis, J. Pelage; Fireman T. Hinds.

1. Nature of accident — 1 horse damaged.
2. Speed at time of accident—4 miles per hour.
3. Weather—Raining.

Position of Crew on Train.

4. Condr. Hind eng; Trainman hind end; Trainman middle; Flagman Head.
5. Is main track blocked? No.
6. What assistance required? None.
7. What material needed? None.
8. Is any person injured. If so, give disposition of injured? None.
9. Witness (in case of personal injury.) None.
10. How many cars derailed and damaged? None.
11. Extent of damage to engine. None.
12. How long will it take to clear track? No time.
13. Initials and numbers of empty and loaded cars damaged; kind of freight and destination. None.
14. How many cars required to transfer freight? None.
15. Remarks. While coming south from 84 Radio Station on a speed of four miles an hour over 9th Street crossing, engine 253 hit a horse. Engine came to a stop. I came off to find out from the man who was riding the horse how it occurred, he said he was riding across and seeing the engine was coming tried to check the horse but knowing that the stables were on the other side it would not check, and it was not the fault of the engine.

(Signed) HERBERT ELLIS,
Conductor."

The witness was then shown another statement, and he said: "That is a statement that I made in my own personal hand writing."

Statement reads as follows:

"Cristobal, July 15, 1915.

"Mr. E. S. Waid,
T. T. Master,
Dear Sir:

On the month of July 4th, 1914, I went on "E" Street to do some switching on our way coming south. Just as we reached 9th St. crossing I saw a horse coming toward the crossing. I gave the engineer a signal to stop. He put his brake on and tried to stop but the horse was just in line to take the hit. The horse fell down and the man who was riding the horse claimed that he was not very much hurt. He gave a statement at the very same time saying that he saw the engine was coming he tried to check the horse but knowing that the stable was over on the other side it would not check its speed, and it was not the fault of the engine crew.

Yours truly,
(Signed) H. ELLIS."

Cross Examination.

I made out both of these statements. They are both true. I was on the engine at the time I gave the engineer a signal to stop, on the side of the engine. I was against the shoulder of the engineer. The engineer could not see me. I said "Look out, there is something coming." I was about an engine length and a half away when I first saw the horse; I don't know about the exact length. I did not personally tell the engineer to stop. I said "There is something coming." The engineer was looking out. He did not pay attention to the signals at once. We were going about four or five miles an hour The engineer was depending on the rider, thinking that he should have escaped by going over the crossing, and he

simply proceeded by going very easy. I didn't exactly tell him to stop; I told him "There is something coming, look out." I told him to look out that there is something in the way. Sure he was looking out, but I don't know where he was looking. It was my duty to tell him there was something in the way. The engine stopped right on the crossing after hitting the horse. The man couldn't control the horse. I said in my letter of July 4, that I was riding on the hind end because anything behind the engine is the back of the engine.

(By Mr. MacIntyre:

Don't you know that if a man is riding in the cab he is not in the hind end?

(Answer:) If you are behind the engineer you say you were on the back of the engine.

85 (By Mr. MacIntyre:)

Now, in writing this letter to Mr. Waid, if you were riding in the cab of the engine just a couple of feet behind the engineer, why did you say "I was on the hind end." Which one of these letters is true?

(Answer:) I told the engineer to stop.

(By Mr. MacIntyre:)

Well, which one of these is true?

(Answer:) This letter of July 15th is all right. It is only a mistake in using the word stopping in the letter of July 4.

(By Mr. MacIntyre:)

How is it you write a more correct statement two weeks after the accident. How is it you give a better story two weeks after? Did you have more time to think it over?

(Answer:) Not exactly that. I had more time to think it over. A mistake may happen in making out a report.

(By Mr. MacIntyre:)
How many reports did you make?
(Answer:) Well, just as often as they asked me for a report.

(By Mr. MacIntyre:)
Why did you write these two letters?
(Answer:) Because I was asked to make a statement.

(By Mr. MacIntyre:)
Why did he ask you for another letter on the fifteenth?
(Answer:) Perhaps he wanted to find out the truth.

(By Mr. MacIntyre:)
He wanted to find out the truth?
(Answer:) Probably.

(By Mr. MacIntyre:)
Then Mr. Waid was not satisfied with your statement that you were riding on the hind end of the engine?
(Answer:) I don't know what was the cause of asking me.

(By Mr. MacIntyre:)
I tell you what you do know. If you had told Mr. Waid that you and the engineer were holding a conversation and running fifteen or sixteen miles an hour you would have been fired and black listed.
(Answer:) Sure, but that couldn't be true.

C. STAMP, witness for the defense, testified as follows:

My name is C. Stamp. I am a brakeman on the Panama Railroad. I have been a brakeman with the railroad going on eleven years and have worked from Panama to Colon. I was working as brakeman on July 4, 1914, on engine 253 with Moorfoot and Ellis. I was on the engine at the time the accident happened to Toppin. We went to the Radio Station, and we were coming back.

I was riding on the back of the engine and when the engine came to a stop I jumped off and saw what had happened. I saw a man walking toward the
86 sidewalk and the horse following him. I did not see the engine hit the horse, and I did not see the horse before it was hit. All I know is that the engine came to a full stop, and just as I came out the horse was walking over to the sidewalk. I was riding on the tank. Engineer Moorfoot is the laziest engineer. He didn't run very fast. He didn't make no time. The bell was ringing. That fellow never takes his hand off that bell. He likes the people to see him with his hand on the bell. He thinks it is necessary. When the engine came to a full stop the engine was just over, and the tender was on the crossing. I didn't have any talk with Toppin. I just looked on. The people came around the horse and it caused a great excitement. I didn't hear Toppin say anything.

Cross Examination.

I saw the horse after it was hit, but not before I got off the engine.

GEORGE CURTIS, a witness for the defendant, testified as follows:

My name is George Curtis. I am at present parlor car porter, Transportation Department, Panama Railroad. I have worked as switchman and flagman for the Panama Railroad. I worked at all occupations for the Panama Railroad. I have been with the Panama Railroad for twelve years in Colon and Cristobal. I was on Moorfoot's engine when it hit Toppin's horse on July 4, 1914. I was a switchman. I was on the tender of the engine on the eastward side. I didn't see the horse before it was struck. I saw the horse after the accident. I had to get down from the engine to see the horse. When the engine came to a full stop I got off on the westward

side and I saw the horse and Toppin standing beside the horse. The tender of the engine was on the road crossing. The engine was over it. The engine was traveling at the switching rate, according to Panama Railroad rules, that is from 4 to 10 miles an hour in the yard. The engine was traveling from seven to nine miles an hour. When we started out the road we started ringing the bell. To my memory at the time of the accident I would not swear it was, but we are in the habit of ringing the bell at all times on Broadway. I could not swear as to the bell ringing; I was on the hind end of the engine at that time, and my attention was to keeping out of the rain. The engine stopped right over the crossing, the tender was on the crossing. After I felt the brake set—the brake was set just north of the crossing at 9th Street, she stopped right over the crossing so that I could walk around. The engine did not go down to 10th Street. We did not go anywhere near 10th Street, emphatically no.

Cross Examination.

When we started off the bell was ringing. We started from the Radio Station. We went there to make a switch. I can't remember how many cars we switched. We had the regular crew we carry on an engine. I don't remember how many cars we switched. We might have switched a half a dozen. I can't recall that now. We were there about ten or fifteen minutes. I don't remember how many cars we switched. That is three years ago. We took some cars from one track to another. I don't know what track we put them on. We took them down to the Radio Station and switched them around. I don't know if we took any cars down with us. We came back with the light engine. Some of the cars that we switched were empty. There were all kinds of cars down there. We were switching all kinds of cars down there that day. There were three trainmen and one foreman beside the fireman and engineer. The first thing I knew about the accident was when I felt the engine slow down. I should judge that we were going from seven to nine miles an

hour. I could have made the ground (jumped off) easy enough. I can get off at the rate of ten
87 miles an hour. I knew there were horse races that day, but I don't know anything about them.

The defendant here rested.

JOSEPH T. TOPPIN, plaintiff, was called in rebuttal, and testified as follows:

I didn't make a statement to the train crew that my horse was going toward the stable and that I could not stop him. I am sure of that. I was down about three minutes, and I tried to get up and the men helped me up, and I walked like this (indicates) and the horse was lying on the concrete gutter with his head on the pavement and died right there. The horse never did get up from his feet; he just died there. I never made a statement in Colon Hospital that I was injured on account of falling off a ladder or that I had fallen off a ladder. I was so sick when I went to Colon Hospital that I never knew anything about making a statement. I never can remember making any statement at all in Santo Tomas hospital that I dated my trouble from an accident which had happened to me about two months before that time.

Cross Examination.

It is not a fact that I was transferred from Ancon Hospital to Santo Tomas hospital because I had no money. The bill was paid in advance. It is not a fact that I left Ancon Hospital because I had no money to pay for any further treatment. I had money. I didn't tell them that I had no money. They charged me the same in Santo Tomas Hospital as they did in Ancon Hospital, and I had to pay medicine beside.

S. FARRELL, for the plaintiff, was called in rebuttal, and testified as follows:

I saw the engine approaching before it hit Toppin. I saw the engineer. He was looking backward. I noticed that. What made me notice it was the engine's speed, and that made me look for the engineer. That engine must have been going very fast; it was going faster than four miles an hour. The engine did not stop with its tender hanging over 9th St. Crossing. It reached clear to 10th Street. I never noticed that the engine backed up. My attention was on the horse dying.

FREDERICK LEACOCK, for the plaintiff, testified as follows:

I saw Toppin about 6:30 P. M. on the day of the accident. I saw him at the house the next day. I took him out of the house on my back. I never carried a ladder to his bed room for him to fall from. He took to his bed about two months after he was hurt. No accident happened to him in his bed. I assisted him to the toilet. Toppin did not get up and walk around in his room or around home or attend to any business to my knowledge. I was rooming next to him. I assisted him around and when he went down stairs I carried him on my back. He would go to see Dr. Blake, and when he came back he got up stairs again the same way.

SAMUEL PHIPPS, a witness for the plaintiff, testified as follows:

My name is Samuel Phipps. I know Joseph Toppin. I was living on the same premises with Mr. Toppin on July 4, 1914, his next door neighbor. I was living in the same building. Toppin was not able to leave his
88 room from July 4, 1914, up to the time he was taken to the Hospital. I never saw him do so. On

two occasions he left the house to go to the doctor, and Leacock took h'm on his back. I dropped in occsionally to see Toppin, almost every day. Toppin took to his bed in the month of September. I never heard anything about his falling off a ladder, and never heard anything about his getting hurt subsequently. He was in bed all of that time.

Cross Examination.

He was not in bed from 4th of July. He took bed from the month of September. I could not tell what time in September. I am sure he went to bed about the month of September. He staid in his easy chair all day from July 4th. He was confined to his house and continued sitting in his easy chair until September, when he went to bed and couldn't get around.

Defendant's counsel read Ancon Hospital report dated December 27, 1914, as follows:

"Claimant's description of accident on admission. Give location and dates: July 4, 1914, struck by a train in Colon and had pain in left hip for one month. Then was alright until the first part of December when he began to have pain in hip (L) and walked with a limp. Since the middle of the present month abcesses of forearm, arm and back have developed."

Plaintiff and defendant announced the conclusion of their testimony.

Defendant, through its counsel, then moved the Court that the Jury be instructed to bring in a verdict for the defendant, which motion was overruled, and to which ruling defendant, through its counsel then and there excepted in open Court.

Whereafter, the Court instructed the Jury, as follows:

"Gentlemen of the Jury: The plaintiff in this case, Joseph Toppin, seeks to recover from the Panama Railroad Company damages in the sum of $15,000.00, as a result of personal injuries received and which personal injuries he claims were caused by reason of the negligence and lack of care and skill on the part of the servants, agents and employees of the defendant company. The specific allegations of his complaint are that on the 4th day of July, 1914, he was riding a stallion the property of one T. A .Green, under a gratuitous bailment, along Broadway Street, in the said city of Colon; and while so riding said horse along said street, and near the corner of Ninth street, in said City of Colon, the said horse suddenly became unmanageable and bolted and swerved and attempted to cross said Broadway street at the Ninth Street crossing. That plaintiff did everything in his power to control said horse and to direct him along Broadway street.

"4. That at said and near said place, the defendant, thru its agents, servants and employees, was operating a railroad locomotive on its said track on Broadway, the said Broadway street being a public street and throughfare, at a careless, reckless and unlawful rate of speed, to wit; from 16 to 20 miles per hour. That the said Broadway and Ninth streets run at right angles to each other, and at their intersection was and is a public crossing whereat the defendant negligently and unlawfully failed to provide any protection whatever; and along and on its said track on Broadway street, and near said public crossing,
89 the said defendant was operating its said locomotive without ringing any bell or sounding any whistle or warning; and when the said stallion on which plaintiff was riding in the manner as aforesaid came near to said crossing he suddenly became unmanageable as aforesaid, and in spite of all plaintiff could do to restrain him, he got upon said crossing and the track of the defendant, when the said locomotive of the defendant, then on its said track on Broadway Street, and near said crossing, and being handled and operated in the manner as herein above stated, ran into and against the said horse, killing him and throwing plaintiff violently

to the ground thereby inflicting grave and serious bruises and other bodily injuries to plaintiff, whereby he suffered grave and serious bruises and sprains, particularly in his left hip; and on account of said injuries occasioned as aforesaid, plaintiff has suffered and is now suffering great and serious bodily pain and intense mental anguish, and has had to spend for medical attendance $437.00 U. S. C., and has been incapacitated from performing his work from said July 4th, 1914, until the present time. That said injuries, occasioned as aforesaid, are of a permanent nature and wholly due to the carelessness and negligence of the defendant, plaintiff being without fault or blame in the premises. All of which to plaintiff's damage in the sum of $15,000.00 U. S. C.

"The answer of the defendant is two-fold. In the first place it constitutes a general denial of each and every one of the allegations of the plaintiff and demands strict proof, which it has a right to do. In the next place the defendant sets up certain laws and decisions of the Courts of Colombia and the Courts of Panama as a defense in this action, by virtue of which it claims that in the first place the railroad company is not responsible for the torts of its servants and employees. I take it to mean that if the company has shown proper care in the selection of its agents and servants it is not liable. In the next place it sets up the fact that the operating of a railroad over the streets of a city without ringing the bell and going faster than a horse would go at a moderate trot, constitutes an offense under the police laws of Panama, for which those operating the train might be fined, and its defense in that respect is that a corporation cannot be held responsible for the criminal acts of its agents, which principle the defendant, through its counsel, claims has been announced by the Supreme Court of Colombia and the Supreme Court of Panama. You must take the law from what this Court tells you, and if this Court is in error as to the law it gives you, then the plaintiff or defendant have their rights to appeal to the Court of Appeals at New Orleans, and from there to the Supreme Court of the United States, to see that the law is properly applied. But you,

gentlemen, are required to take the law as I give it to you, and I charge you that a railroad corporation is responsible for the negligent acts of its employees, agents and servants, and that it is not the law as alleged by the defendant that they are not liable although they may use the greatest case [care] in the selection of their servants, agents, and employees. A corporation acts only through her servants, agents and employees, and the law holds the corporation responsible for any illegitimate and direct consequence of a negligent act of any agent, servant, or employee, however much care it may have exercised about the selection of that employee.

Furthermore, I charge you that although a law may make an act of a corporation an offense so that those servants or agents committing it might be fined and dealt with criminally, nevertheless, if injury results to one by reason thereof, and if the act which is at the same time punishable under the criminal or municipal
90 laws is at the same time an act which is negligent, that is, one in which they have failed to exercise the proper care, circumspection and prudence under the circumstances, the company may be held liable notwithstanding the fact that the law also requires a criminal process.

"That, now, gentlemen, brings me to the issue in this case, and that is—was the defendant guilty through its servants, agents, and employees of the charge of negligence and the exercise of proper care, and if so was the injury to the plaintiff the result thereof—the natural, proximate, and ordinary result thereof. The plaintiff claims that he was riding a stallion, a somewhat fractious horse, along Broadway, and that near the intersection of Broadway and 9th Streets the horse became unmanageable and suddenly swerved in and upon the track, and that as he did so there was approaching in the direction of 9th St. an engine, an unattached engine, and that at the same time the horse swerved upon the track, that the engine was about a block off more or less coming from the north—Gentlemen of the Jury, when I attempt to state facts to you relating to distances, etc. I am giving only

my recollection and you are to apply your own recollection—but as I understand it he claims that the horse swerved when the engine was more than a block off, and got onto the railroad track; and that he tried his best to get him off and that he did not succeed in getting him off; and that the engine was coming at a high rate of speed without ringing the bell or giving warning and ran into him, striking him on the right hip, throwing the plaintiff off and killing the horse, and the plaintiff suffering the injuries which he claims for.

"Now, as I say, you must find that the defendant was not only guilty of negligence, but that the negligence caused the injury, and in the first place I charge you that in my opinion you can eliminate the question of the ringing of the bell, because I do not think that the ringing of the bell, however much it may be rung, would prevent a fractious horse from getting up on the track. That, in my opinion, would have nothing to do with the injury. Whether they rang the bell or not does not furnish the cause of the injury, does not furnish the ground for complaint; I do not see how the failure to ring the bell had anything to do with a fractious horse running onto the track.

"But the negligent acts that might affect this case, and that might be the result is that the defendant was running its engine at such a rate of speed as that it could not properly stop within an ordinary, reasonable distance in passing over the public streets of the city upon the appearance of danger, and also that it did not stop upon the appearance of danger, and also that it did not stop upon the appearance of danger upon the street, that is, when it knew or when it should have known that this horse was upon the track or so near thereto, and coming in such a manner that a collision would in all probability result if it did not stop that engine. Now on that, Gentlemen, I charge you as a matter of law that in passing over the streets of Colon the defendant was required to go at a moderate rate of speed; the ordinance says not more than the average horse would trot, and in passing over the streets of the city, especially at intersections where there

are no gates or barriers I would also charge you that it was the duty of the defendant to go, aside from any municipal order, at such a rate of speed as would enable them to stop within a reasonable distance upon the appearance of danger upon the track; and also that it is the duty of those in charge and control of an engine operating over the streets of a city to keep a look-out under such circumstances at crossings for people who may be about to cross the track, and if they see any person in a dangerous position upon the track under such circumstances as would indicate to an ordinary man that they were not able to get off, then it would be the duty of the company to do everything in their power to stop that engine, and it was their duty to run it at such a rate of speed as would enable them to stop it. They are required to keep a look-out for the appearance of danger, and they are required to stop upon the appearance of danger, and they are required not to go so fast that they cannot stop within a reasonable distance upon the appearance of danger.

91

"Now, the claim of the defendant is that this engine was going at a reasonable rate of speed, and that this horse suddenly, just as the engine got to 9th Street Crossing, swerved onto the track in his attempt to get to the stable, and that by reason thereof the injury resulted. Now, gentlemen, if those are the facts of the case, if those in control of the engine did not see the horse, and could not reasonably have been expected to see his perilous position before, and could not have stopped the engine to avoid it, then it would be an unavoidable accident and in that case the plaintiff would not be entitled to recover, because the law does not give the right to recover for an unavoidable accident, however distressing it may be. So that, even if you should find that the defendant was guilty of negligence in the manner of running its engine, that is, running it too fast, and then you should also find that the plaintiff by reason of his negligence allowed the horse to swerve in upon a rapidly approaching engine just at the moment it was going over the crossing, so that they would not have the time to stop; or even if you find

that the engine was running rapidly at a careless reckless rate of speed and you should find that accidentally he swerved in at that time and so that the injury was the joint result of the negligence of the Company and the negligence of the rider or the unfortunate actions of the horse in swerving in at that time, then and under those circumstances I charge you that the plaintiff is not entitled to recovery.

"But there is another point that I want you to keep in mind. If you find that the plaintiff was negligent in allowing the horse to go on the track, or if you should find that the horse swerved on the track and got there either carelessly or otherwise by reason of the plaintiff in this case, and after being there where he had no right to be, nevertheless the defendant saw him in a perilous position in time to stop and did not stop, then the plaintiff's contributory negligence would be no bar and the defendant would be liable. For the law is that however careless a person may be in putting himself in a place of danger, if after having put himself carelessly in that place of danger another person without exercising that care and prudence that is ordinarily expected of careful and prudent men, saw that person there and afterwards did not try prevent injury to him, he is liable, notwithstanding that in the first instance the plaintiff was guilty of contributory negligence. That is what we call the doctrine of proximate and indirect cause. And so I will go a step further, that if the plaintiff negligently allowed the horse to get there, or he got there accidently and the defendant did not see him, but if he could have seen him and should have seen him by the exercise of proper care, if he could not see him in time to appreciate the dangerous position in which he was and then did not use the proper care to stop that engine, then he would be liable because the law not only requires the defendant to use all proper means to prevent an injury, but it requires it to use the pro-
92 per care to see whether or not someone may be in a position of danger, especially in operating over the streets of a city.

"Now Gentlemen, I charge you in this case further, that the burden of proof is upon the plaintiff to establish not only that the defendant was negligent, but that his injury is the result of the accident. The mere happening of the injury or the mere striking of a horse does not raise the presumption; he must prove it by a fair preponderance of testimony, not beyond a reasonable doubt as in criminal cases — the burden of proof is upon him. But by a fair preponderance of the evidence is not meant that the defendant must call a greater number of witnesses. It sometimes happens in every-day life that the testimony of one intelligent witness may outweigh that of a half dozen others. Now you have the right to adopt that same consideration in this case as in ordinary circumstances of every-day life. Now, if under the rules I have given to you you find that the plaintiff has not established the fact of the defendant's negligence, that his injury was the result thereof by a fair preponderance of the evidence, then your verdict should be for the defendant, If, however, you find that the defendant was negligent. and that that negligence caused the injury to the plaintiff, then the further question is for you to assess the amount of damages to which you think the plaintiff is entitled, and in that connection I charge you that he is entitled to any and all expenses that he may have incurred, if you find that he is entitled to anything. You have heard his statement, I think that he paid out the sum of $437.00 Gold for medical attention, hospital, medicine, etc. You have also heard his statement as to the loss of his business, and in that connection I charge you that the dimunition of his earning capacity as the result of his injuries, is also an element of damages. You may consider in that respect how much his business has suffered, if it has suffered as a result of this injury. You remember his statement that he has not been able to give his personal attention to it since the 4th of July, 1914, and was confined to his house until September when he took to bed and went to the hospital in December for a long time, and that since that time he has been giving his attention to the business only with assistance. That is a matter

entirely for your consideration, that is how much his business has suffered on account of the dimunition of his earning capacity, on account of the injury. All these are questions for you to determine.

"Now there is also another element in the case as to the permanancy of his injuries. He claims that he is permanently disabled, and if you so find you are entitled to allow damages on account of the permanent nature of the injury. He claims also that tuberculosis of the spine has developed as a result of this injury. Now, we have heard a great deal of medical learning here on that subject, that we all more or less, have the germs of tuberculosis in our systems, and that sometimes it developes and sometimes it does not. It sometimes developes as a result of an injury. He claims that this injury developed tuberculosis of the spine. Now, Gentlemen, I charge you as follows: If the plaintiff has developed tuberculosis of the spine as a result of the injuries received, then you may consider the tuberculosis as an element of damages, provided, of course, that you find for the plaintiff. By this I mean to be understood as saying that every person is liable for the natural consequences of its own negligence. It is liable for the consequences that might be reasonably expected to follow or flow from its negligence, its negligent acts, and if one person has troubles peculiar to himself as distinguished from the generality of us, that he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequences of the act resulting to the ordinary indivudial, and in that connection you
93 have a right to consider what the Doctor said that seventy-five or eighty-five percent have latent infirmities which might be developed as a result of an injury.

"Gentlemen, I cannot conclude my charge to you without calling your attention to two circumstances. There has been a great deal said for and against the Panama Railroad. There has been a great deal said here about the plaintiff in the case being colored. Now, Gentlemen,

we are not trying the question as to whether or not the Panama Railroad Company is a good corporation or a bad corporation. We are not trying the question as to whether corporations generally are good and beneficial for society or are cruel, heartless institutions. You are not to give any verdict in this case against the defendant on account of any prejudice that anyone of you may have either for or against the Panama Railroad Company, or for or against a corporation. On the other hand, Gentlemen, I charge you that you are to do your duty fearlessly, and again I charge you, Gentlemen, that as you know that this man is colored, his position in life has nothing to do with your verdict. It would indeed be a lamentable situation, a travesty, if a jury should decline to give justice to a man on account of his color or condition in life, or decline what they would give to another under the same circumstances. One of the most famous of the many famous expressions of Theodore Roosevelt was: "My spear knows no brother," and the scales of justice knows no color, race, creed, or social position whatever, nor does it know or recognize any feeling of hostility towards a corporation because it is one.

"You are to take this case and decide it on its merits, just as if it was between two of your neighbors or friends, or if it was between two persons you have never heard of. And now, Gentlemen, you may repair and deliberate upon your verdict. The case is in your hands. If you find for the plaintiff I charge you that physical pain and suffering is an element of damages that you may consider. You may consider physical pain and suffering which the plaintiff has suffered as an element of damages in the case, but it is impossible for any of us to say how much he has suffered in dollars and cents; but nevertheless it is an element of damages in this case."

Upon the conclusion of the Court's charge to the Jury, defendant, through its counsel, then and there in open Court noted the following exceptions to such charge:

First. To that part of the charge which instructs the Jury that the plaintiff may recover under the Panamanian law.

Second. To that part of the charge which instructs the Jury that they may bring in a verdict for the plaintiff, notwithstanding the evidence shows that the defendant had been careful in the selection of its servants.

Third. That part of the charge which instructs the Jury that they may bring in a verdict for the defendant, notwithstanding they might find that the acts of the defendant were criminal, if, in fact, they were found
94 guilty of any illegal act.

The portions of the charge referred to in the first, second, and third exceptions, read as follows:

"In the next place the defendant sets up certain laws and decisions of the Courts of Colombia and the Courts of Panama as a defense in this action, by virtue of which it claims that in the first place the railroad company is not responsible for the torts of its servants and employees. I take it to mean that if the company has shown proper care in the selection of its agents and servants it is not liable. In the next place it sets up the fact that the operating of a railroad over the streets of a city without ringing the bell and going faster than a horse would go at a moderate trot, constitutes an offense under the police laws of Panama, for which those operating the train might be fined, and its defense in that respect is that a corporation cannot be held responsible for the criminal acts of its agents, which principle the defendant, through its counsel, claims has been announced by the Supreme Court of Colombia and the Supreme Court of Panama. You must take the law from what this Court tells you, and if this Court is in error as to the law it gives you, then the plaintiff or defendant have their rights to appeal to the Court of Appeals at New Orleans, and from there to the Supreme Court of the United States, to see that the law is properly applied. But you, gentlemen, are required to take

the law as I give it to you, and I charge you that a railroad corporation is responsible for the negligent acts of its employees, agents and servants, and that it is not the law, as alleged by the defendant, that they are not liable although they may use the greatest care in the selection of their servants, agents and employees. A corporation acts only through its servants, agents and employees, and the law holds the corporation responsible for any illegitimate and direct consequences of a negligent act of any agent, servant or employee, however, much care it may have exercised about the selection of that employee.

"Furthermore, I charge you that although a law may make an act of a corporation, an offense so that those servants or agents committing it might be fined and dealt with criminally, nevertheless, if injury results to one by reason thereof, and if the act which is at the same time punishable under the criminal or municipal laws is at the same time an act which is negligent, that is, one in which they have failed to exercise the proper care, circumspection and prudence under the circumstances, the company may be held liable notwithstanding the fact that the law also requires a criminal process."

Fourth. To that part of the charge as given in respect to the question as to whether or not tuberculosis developed as a result of the injury.

The portion of the charge objected to reads as follows:

"Now there is another element in the case as to the permanency of his injuries. He claims that he is permanently disabled, and if you so find you are entitled to allow damages on account of the permanent nature of the injury. He claims also that tuberculosis of the spine has developed as a result of this injury. Now, we have heard a great deal of medical learning here on that subject, that we all, more or less, have the germs of tuberculosis in our system, and that sometimes it developes and sometimes it does not. It sometimes developes as a result of an injury. He claims that this injury developed

tuberculosis of the spine. Now, Gentlemen, I charge you as follows: If the plaintiff has developed
95 tuberculosis of the spine as a result of the injuries received, then you may consider the tuberculosis as an element of damages, provided, of course, that you find for the plaintiff. By this I mean to be understood as saying that every person is liable for the natural consequences of its own negligence. It is liable for the consequences that might be reasonably expected to follow or flow from its negligence, its negligent acts, and if one person has troubles peculiar to h mself as distinguished from the generality of us, that he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequences of the act resulting to the ordinary individual, and in that connection you have a right to consider what the doctor said that seventy-five or eighty-five percent have latent infirmities which might be developed as a result of an injury."

Fifth. To that portion of the charge which instructed the Jury that they are authorized to bring in damages for physical pain and suffering. The portion of the charge objected to reads as follows:

"If you find for the plaintiff I charge you that physical pain and suffering is an element of damages that you may consider. You may consider physical pain and suffering which the plaintiff has suffered as an element of damages in this case, but it is impossible for any of us to say how much he has suffered in dollars and cents; but nevertheless it is an element of damages in this case."

Thereafter the Jury retired to consider their verdict, and on the same day came into Court and asked for further instructions, which were given as follows:

"The Court:

Gentlemen of the Jury, is there some question you wish to ask?

"Juror:

There seems to be a misunderstanding as to one of the charges relating to the negligence of both parties, whether the negligence of one party clears the other of negligence.

"The Court:

Not necessarily. As I tried to explain, Gentlemen, if you find the defendant was negligent, then the plaintiff's negligence does not clear the defendant's negligence or his responsibility unless it was joint and concurring, and, as I tried to explain to you, if the plaintiff was guilty of negligence in allowing his horse to go upon the track, and, even after he got upon the track, by reason of the negligence of the plaintiff, or any other way, and being there negligently, the defendant, nevertheless, saw him and could have stopped in time to have prevented the injury, then, and in that event, the negligence of the plaintiff would not be a bar to the question, or, suppose that the defendant ought to have seen him, because, as I have explained, the defendant should be on the lookout, and if the defendant was there negligently or accidentally and the defendant either saw him, or, in the exercise of proper care, should have seen him in time to have stopped and to have avoided the injury, and the defendant did not, then the negligence of the plaintiff is not a bar. The concurrence is, if the engineer was negligent in coming along and the plaintiff was negligent in swerving in at that particular time so that the two happened together, then that would relieve the defendant, but if the plaintiff got on there beforehand in time for the defendant to see him and he did not stop, then the negligence of the defendant does not excuse him. Now then I will try to explain a little more fully. If he was negligent
96 in putting himself upon the track and still the defendant saw he was there negligently and saw he was not going to get off, then that negligence would not be an excuse for the defendant, but, ordinarily, the defendant, an engineer, has the right to suppose that nobody is going to get on the track, or that they would

swerve in, and they have a right to suppose that once on there they are going to try to get off and they have a right to act accordingly, so it comes back again to the evidence. The plaintiff said he was on the track and was trying to get off and that the horse was fractious and he could not get him off and the engine was approaching, now if that is so and the defendant saw him on the track, negligently though it may be, and saw that he was there under such circumstances and supposed he was going to get off, and danger was imminent, then it was the duty of the defendant to use all proper efforts to stop."

And later, on the same day of the trial, the Jury returned a written verdict into open Court, as follows:

"We, the jury, on the issues joined herein, find for the plaintiff, and assess his damages in the sum of Ten Thousand and dollars ($10,000.00) United States Currency."

Whereupon counsel for the defendant company gave notice of a motion for a new trial, which motion was duly filed on the twentieth day of June, 1917, and which motion, omitting caption, reads as follows:

Omitted from the Printed Record, being heretofore printed at page 59.

* * * * * * * * * * * * * * *

99 Thereafter, on the twenty-second day of June, 1917, at the request of plaintiff's counsel, the said motion for a new trial was set down for hearing on July 6th, 1917, by order of the Court, which order, omitting caption, reads as follows:

"Ordered, upon request of counsel for the plaintiff, that arguments on defendant company's motion for a new trial, heretofore filed on June 20, 1917, during the current term of this Court, be submitted in the Courthouse at Cristobal on Friday, July 6th, 1917, at 9:00 A. M.,

or as soon thereafter on the said date as to the Court may be convenient, without prejudice to the defendant company's right of appeal on account of the fact that such arguments on said motion for a new trial were not heard by the Court within the current term.

(Signed) WM. H. JACKSON,
District Judge."

Attest:
This 25th day of June, 1917.
E. M. GOOLSBY,
Clerk of the District Court."

Subsequently, the date for argument on said motion was changed to July 5, 1917, at the Courthouse in the Division of Balboa.

Thereafter, on July 5, 1917, arguments of counsel for the respective parties having been heard on said motion for a new trial, the same was overruled on July 16, 1917, to which ruling counsel for the defendant company then and there in open Court excepted.

Whereupon the Court ordered the entry of
100 judgment in the sum of $10,000.00 in favor of the plaintiff against defendant company, together with costs. Counsel for the defendant company thereupon objected to said judgment, and their objection having been by the Court overruled, exception was noted; and the Court thereupon gave said defendant company thirty days within which to file its bill of exceptions.

And thereafter, on the 24th day of July, 1917, counsel for the defendant company filed the foregoing statement of facts and bill of exceptions.

Now, therefore, the defendant company, by counsel, here tenders to the Court the foregoing statement of facts and bill of exceptions to the Court's ruling in this case which statement of facts and bill of exceptions contains all the material facts adduced by the parties on the trial of this cause, the defendant respectfully asks that the

foregoing statement of facts and bill of exceptions be approved by the Court and made a part of the record of this cause.

Respectfully,
FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for defendant.

United States of America,
Canal Zone. ss.

The plaintiff, by his attorneys, W. C. Todd and W. C. MacIntyre, hereby agrees that the foregoing statement of facts and bill of exceptions contains all the material facts adduced by the parties on the trial of the herein cause, as well as a correct record of all the objections made and exceptions saved by both parties to this suit; and said plaintiff, by his attorneys, hereby requests the Court to approve the foregoing statement of facts and bill of exceptions, and to make same a part of the record of this cause.

W. C. TODD,
WM. C. MACINTYRE
101 Attorneys for plaintiff.

Approved and orderd filed and made a part of the record.
(Seal) WM. H. JACKSON, Judge.

Attest:
E. M. GOOLSBY, (Seal)
Clerk of the Court.

Filed this 24th day of July, 1917.
W. B. CHEATHAM,
Assistant Clerk of the District Court,
Cristobal Division.

102 PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

United States of America, Canal Zone.

In the District Court of the Canal Zone, Division of Cristobal.

Joseph T. Toppin, Plaintiff,
vs. Civil No. 96.
Panama Railroad Company, a Corporation, Defendant.

Petition for Writ of Error and Supersedeas.

Comes now the defendant company by Frank Feuille and Walter F. Van Dame, its counsel, and feeling itself aggrieved by the judgment of the Court in the above entitled cause, entered on the fourteenth day of July, nineteen hundred and seventeen,—and in which cause the defendant company's motion for a new trial was by the Court overruled on the aforementioned date,—petitions the Honorable Court for an order allowing said defendant company to prosecute a writ or error to the United States Circuit Court of Appeals for the Fifth Circuit, and that upon giving and furnishing security in the amount of twelve thousand dollars ($12,000.00) United Stats currency, which is the sum as fixed by the Court on the twentieth day of July, nineteen hundred and seventeen, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

(Sgd.) FRANK FEUILLE,
(Sgd.) WALTER F. VAN DAME,
Attorneys for the defendant company.

Indorsed: Filed July 31, 1917.

103 ASSIGNMENT OF ERRORS.

United States of America.

In the United States Circuit Court of Appeals for the Fifth Circuit, Sitting at New Orleans, Louisiana.

The Panama Railroad Company, a Corporation, Plaintiff in Error,
vs.
Joseph T. Toppin, Defendant in Error.

Assignment of Errors.

Comes now the Panama Railroad Company, plaintiff in error, by its counsel, Frank Feuille and Walter F. Van Dame, and files the following assignment of errors on which it will rely upon its prosecution of the writ of error in the above entitled cause.

1. The Court erred in overruling the plaintiff in error's general demurrer to the amended complaint, and to which ruling of the Court an exception was duly saved by counsel for plaintiff in error.

II. The Court erred in overruling plaintiff in error's motion for a directed verdict in favor of the plaintiff in error, which motion was made after all of the evidence had been submitted to the Court and July by both parties, and to which ruling an exception was then and there duly saved by counsel for plaintiff in error in open Court.

III. The Court erred in its charge to the Jury in that part wherein the Jury were instructed that the defendant in error might recover under the Panamanian law.

IV. The Court erred in instructing the jury that they might bring in a verdict for the defendant in error, notwithstanding the evidence showed that the plaintiff in error had been careful in the selection of its servants.

V. The Court erred in instructing the Jury that they might bring in a verdict for the defendant in error, notwithstanding they might find that the acts of
104 plaintiff in error's agents were criminal, if, in fact they were guilty of an illegal act.

The exceptions to the Judge's charge, set forth in assignments of error numbers III, IV and V were duly noted in open Court by plaintiff in error's counsel, and they relate to the following portions of the Judge's charge to the Jury:

"In the next place the defendant sets up certain laws and decisions of the Courts of Columbia and the Courts of Panama as a defense in this action, by virtue of which it claims that in the first place the railroad company is not responsible for the torts of its servants and employees. I take it to mean that if the company has shown proper care in the selection of its agents and servants it is not liable. In the next place it sets up the fact that the operating of a railroad over the streets of a city without ringing the bell and going faster than a horse would go at a moderate trot, constitutes an offense under the police laws of Panama, for which those operating the train might be fined, and its defense in that respect is that a corporation cannot be held responsible for the criminal acts of its agents, which principle the defendant, through its counsel, claims has been announced by the Supreme Court of Colombia and the Supreme Court of Panama. You must take the law from what this Court tells you, and if this Court is in error as to the law it gives you, then the plaintiff or defendant have their rights to appeal to the Court of Appeals at New Orleans, and from there to the Supreme Court of the United States, to see that the law is properly applied. But you, gentlemen, are required to take the law as I give it to you, and I charge you that a railroad corporation is responsible for the negligent acts of its employees, agents and servants, and that it is not the law, as alleged by the defendant, that they are not liable although they may use the greatest care in the selection of their servants, agents and employees. A corporation

acts only through its servants, agents and employees, and the law holds the corporation responsible for any illegitimate and direct consequences of a negligent act of any agent, servant or employee, however much care it may have exercised about the selection of that employee.

"Furthermore, I charge you that although a law may make an act of a corporation an offense so that those servants or agents committing it might be fined and dealt with criminally, nevertheless, if injury results to one by reason thereof, and if the act which is at the same time punishable under the criminal or municipal laws is at the same time an act which is negligent, that is, one in which they have failed to exercise the proper care, circumspection and prudence under the circumstanees, the company may be held liable notwithstanding the fact that the law also requires a criminal process."

VI. The Court's charge to the Jury was
105 error in that part which related to the issue as to whether or not tuberculosis had developed as a result of the injury received by defendant in error. The portion of the charge objected to, and which objection was then and there noted in open Court, reads as follows:

"Now there is another element in the case as to the permanency of his injuries. He claims that he is permanently disabled, and if you so find you are entitled to allow damages on account of the permanent nature of the injury. He claims also that tuberculosis of the spine has developed as a result of this injury. Now, we have heard a great deal of medical learning here on that subject, that we all, more or less, have the germs of tuberculosis in our system, and that sometimes it developes as a result of an injury. He claims that this injury developed tuberculosis of the spine. Now, Gentlemen, I charge you as follows: If the plaintiff has developed tuberculosis of the spine as a result of the injuries received, then you may consider the tuberculosis as an element of damages, provided, of course, that you find for the plaintiff. By this

I mean to be understood as saying that every person is liable for the natural consequences of its own negligence. It is liable for the consequences that might be reasonably expected to follow or flow from its negligence, its negligent acts, and if one person has troubles peculiar to himself as distinguished from the generality of us, that he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequences of the act resulting to the ordinary individual, and in that connection you have a right so consider what the doctor said that seventy-five or eighty-five per cent have latent infirmities which might be developed as a result of an injury."

VII. The Court erred in its charge to the Jury in instructing them that they were authorized to bring in damages for physical pain and suffering. The portion of the charge objected to and which objection was then and there noted in open Court, reads as follows.:

"If you find for the plaintiff I charge you that physical pain and suffering is an element of damages that you may consider. You may consider physical pain and suffering which the plaintiff has suffered as an element of damages in this case, but it is impossible for any of us to say how much he suffered in dollars and cents; but nevertheless, it is an element of damages in this case."

VIII. The Court erred in overruling plaintiff in error's motion for a new trial, and to which ruling of the
106 Court plaintiff in error, through counsel, duly noted an exception.

IX. The Court erred in overruling plaintiff in error's objection to the judgment entered in favor of the defendant in error and against plaintiff in error, and which judgment was based on the verdict of the Jury; and the plaintiff in error, through counsel duly excepted to the Court's ruling.

Wherefore, plaintiff in error prays that the judgment of the District Court of the Canal Zone, for the Division of Cristobal be reviewed by the United States Circuit Court of Appeals for the First Judicial Circuit, and that the said judgment be reversed and the cause remanded for a new trial.

(Sgd.) FRANK FEUILLE,
(Sgd.) WALTER F. VAN DAME,
Attorneys for plaintiff in error.

Filed July 31st, 1917.

BOND ON WRIT OF ERROR.

United States of America, Canal Zone.

In the District Court of the Canal Zone, Division of Cristobal.

Joseph T. Toppin, plaintiff,
vs. Civil No. 96.
Panama Railroad Company, a Corporation, defendant.

Bond on Writ of Error.

Whereas a judgment was rendered on the 14th day of July, nineteen hundred and seventeen in the above entitled and numbered cause in the said District Court of the Canal Zone for the Division of Cristobal, in the sum of ten thousand dollars ($10,000.00) United States currency, and all costs in favor of the plaintiff, Joseph T. Toppin, and against the defendant, the Panama Railroad Company, and the Court having overruled the defendant company's motion for a new trial on the 14th day of July, nineteen hundred and seventeen, and said defendant having been duly granted a review of said judgment by the United States Circuit Court of Appeals for the Fifth Circuit, by writ of error, and the de-

107

fendant having been required to execute and file bond on said writ of error in the sum of twelve thousand dollars ($12,000.00) United States currency, in the terms of the law, in order that execution of said judgment might be saved.

Now therefore, the Panama Railroad Company, the defendant, as principal, and I. L. Maduro, as surety, acknowledge themselves jointly and severally indebted to Joseph T. Toppin, the plaintiff in said suit, in the full sum of twelve thousand dollars ($12,000.00) United States currency, upon the condition that said defendant, the Panama Railroad Company, shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make the plea good.

Witness our hands this 24th day of July, nineteen hundred and seventeen.

PANAMA RAILROAD COMPANY,
Defendant.
By (sgd.) S. W. HEALD, its Superintendent.
(sgd.) I. L. MADURO, Surety.

Approved:
(Sgd.) WM. H. JACKSON,
District Judge of the Canal Zone.

Indorsed: Filed July 24th, 1917.

108 ORDER ALLOWING WRIT.

United States of America, Canal Zone.

In the District Court of the Canal Zone, Division of Cristobal.

Joseph T. Toppin, Plaintiff,

vs. Civil No. 96.

Panama Railroad Company, a Corporation, defendant.

Order Allowing Writ of Error.

Upon motion of Frank Feuille and Walter F. Van Dame, counsel for the defendant company, and upon filing a petition for a writ of error and in the assignment of errors, it is

Ordered that a writ of error be and hereby is allowed to have review in the United States Circuit Court of Appeals for the Fifth Circuit. The judgment heretofore entered herein on the fourteenth day of July, nineteen hundred and seventeen, — and in which cause the Court overruled the defendant company's motion for a new trial on the aforementioned date, — and that the amount of bond on said writ of error as has been already fixed by the Court, be and is the sum of twelve thousand dollars ($12,000.00), United States Currency.

And it is further ordered that citation in error issue to the said Joseph T. Toppin, plaintiff herein.

(Sgd.) WM. H. JACKSON, District Judge.

Attest:

(Sgd.) W. B. CHEATHAM, Asst. Clerk.

111 CLERK'S CERTIFICATE.

United States of America,
Canal Zone, ss.
District Court of the Canal Zone
Cristobal Division.

I, W. B. CHEATHAM, Assistant Clerk of the District Court of the Canal Zone for the Division of Cristobal, by virtue af the aforegoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to tne hundred and ten, inclusive, contain a true and complete transcript of the record and proceedings had in the said Court in the cause of the Panama Railroad Company, a Corporation, Plaintiff in Error, against Joseph T. Toppin, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at Cristobal, Canal Zone, in the division of Cristobal for the District Court of the Canal Zone, this 12th day of December, in the year of Our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-first.

(Seal) W. B. CHEATHAM,
Assistant Clerk.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

Argument and Submission.

Extract from Minutes of March 6th, 1918.

No. 3203.

PANAMA RAILROAD COMPANY

versus

JOSEPH T. TOPPIN.

On this day this cause was called, and, after argument by Frank Feuille, Esq., for plaintiff in error, and William C. MacIntyre, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed April 17th, 1918.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3203.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JOSEPH T. TOPPIN, Defendant in Error.

Error to the District Court of the Canal Zone.

Frank Feuille and Walter F. Van Dame, for plaintiff in error.
W. C. Todd and Wm. C. MacIntyre, for defendant in error.

Before Walker and Batts, Circuit Judges, and Foster, District Judge.

WALKER, *Circuit Judge:*

This was a suit brought by the defendant in error in the District Court of the Canal Zone to recover damages for personal injuries alleged to have been caused by the negligent operation, on a public street or thoroughfare in the Republic of Panama, by employees of the plaintiff in error of a railroad locomotive of the latter. The amended complaint alleged that the following were laws in force in the Republic of Panama:

Art. 2341, Civil Code of Panama.

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed."

Art. 5. Law 62, 1887.

"Railroad Companies are responsible for the wrongs and injuries which are caused to persons or properties by reason of the service of said railroads and which are imputable to want of care, neglect, or violation of the respective police regulations which shall be issued by the Government as soon as the law is promulgated."

Arts. 488, 489, Police Code.

"When a tramway crosses a town, as well as when it passes by a gate or viaduct, it shall not travel at a greater speed than that of a wagon drawn by horses at a moderate trot; in case of an infraction the conductor or the administrator of the company subsidiarily shall pay a fine of 10 to 100 pesos, without prejudice to the responsibility, civil or penal, to which he may be subject by reason of the damage, fault or tort:

"The tramway, when passing places where there are or may be a gathering of persons, shall call their attention from afar, and continue to call the attention of the transient persons, by means of a whistle, bell, horn, or other adequate instrument. Every infraction of this provision shall be punished with a fine of from 5 to 100 pesos; but if the omission should occasion damage or prejudice to a third person, the procedure provided for in the preceding article shall be followed;

"This article and the previous articles shall be applied to railroads when they enter cities or towns."

There was evidence tending to prove that the plaintiff was injured as alleged. The existence of the quoted laws of Panama was not denied by the defendant, but it was contended in its behalf that a request for a directed verdict in its favor should have been given on the ground that neither of those laws, as it was authoritatively interpreted and enforced in Panama, had the effect of making a railroad company answerable for the negligence or misconduct of its employees while acting within the scope of their employment, and that the doctrine of respondeat superior is not a part of the law of Panama. We are not of opinion that the evidence which was adduced as to the laws of Panama supports this contention. On the contrary, we think the evidence is such that it well supports a finding that the quoted statute of 1887, as it has been authoritatively interpreted in Columbia while Panama was a part of that country, has the effect of making railroad companies responsible for personal injuries caused by the want of care or negligence of their employees while engaged in the service they were employed to render.

Under the law in force in Panama and in the Canal Zone *for* damages for physical pain and suffering are recoverable in such an action as the instant one. Panama R. Co. vs. Bosse, 239 Fed. 303. The ruling of the Court to this effect which was assigned as error was in conformity with the decision just cited, and was not erroneous.

An exception was reserved to a part of the court's charge to the jury which was to the effect that if the plaintiff has developed tuberculosis of the spine as a result of the injuries complained of, then the jury could, if they found for the plaintiff, consider the tuberculosis as an element of damages. This exception is sought to be supported on the ground that no evidence adduced tended to prove that the development of the tuberculosis mentioned was attributable to the injury complained of. The evidence does not justify this contention. It was such as to furnish support for a finding that the development of the disease in the plaintiff's system was a proximate result of the injury complained of.

The conclusion is that there was no recoverable error in any ruling complained of.

The judgment is affirmed.

Judgment.

Extract from Minutes of April 17th, 1918.

No. 3203.

PANAMA RAILROAD COMPANY

versus

JOSEPH T. TOPPIN.

This cause came on to be heard on the transcript of the record from the District Court of the Canal Zone, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Panama Railroad Company, and the surety on the writ of error bond herein, I. L. Maduro, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Notice of Intention to Apply for Writ of Error.

Filed May 16th, 1918.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JOSEPH T. TOPPIN, Defendant in Error.

Now comes the Panama Railroad Company, by its Attorneys, Frank Feuille and Walter F. Van Dame, and respectfully give notice

that the plaintiff in error will apply for a writ of error in due course to the Supreme Court of the United States.

Respectfully,

(Signed) FRANK FEUILLE,

(Signed) WALTER F. VAN DAME,

Attorneys for the Panama Railroad Company,
Plaintiff in Error.

Petition for Writ of Error, and Order Allowing Same.

Filed June 7th, 1918.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3203.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JOSEPH T. TOPPIN, Defendant in Error.

Petition for Writ of Error from the Supreme Court to the Circuit Court of Appeals for the Fifth Circuit.

The Panama Railroad Company, plaintiff in error in the above numbered and styled cause, by its attorneys Frank Feuille and Walter F. Van Dame, respectfully represent unto the United States Circuit Court of Appeals for the Fifth Circuit that a judgment was rendered by said Court on April 17, 1918, in the above styled cause, affirming the judgment of the District Court of the Canal Zone, in favor of the said defendant in error and against the plaintiff in error, in the sum of ten thousand dollars and costs; that this is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, in conformity with Section 9 of the Act of Congress, approved August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the sanitation and government of the Canal Zone," and commonly known as "The Panama Canal Act"; that the plaintiff in error believes that it is entitled to a reversal of this case, and is desirous that the same be reviewed by the Supreme Court of the United States upon the assignment of errors which accompany this petition for a writ of error.

The premises considered, the plaintiff in error respectfully prays that a writ of error to the Supreme Court of the United States be allowed, and that a supersedeas issue upon the filing of a good and sufficient bond by the plaintiff in error, in conformity with the orders of the Court, and that an order of the Court be made fixing the amount of security which the plaintiff in error shall give upon the said writ of error, and that upon the giving of such security, all further proceedings in this Court shall be superseded and stayed.

until the determination of said writ of error by the said Supreme Court of the United States.

THE PANAMA RAILROAD COMPANY,
Plaintiff in Error,

By FRANK FEUILLE,
WALTER F. VAN DAME,
Its Attorneys.

The writ of error is allowed as prayed for, to operate as a supersedeas, and the plaintiff in error is hereby required to file a good and sufficient bond in the sum of Twelve Thousand Five Hundred Dollars.

7th day of June, 1918.

(Signed) RUFUS E. FOSTER,
Judge.

Assignments of Error.

Filed June 7th, 1918.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3203.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JOSEPH T. TOPPIN, Defendant in Error.

Assignments of Error on Appeal to the United States Supreme Court.

Now comes the Panama Railroad Company, plaintiff in error, and assigns the following as errors upon which it will rely in the prosecution of the writ of error in the above entitled cause:

I. The Circuit Court of Appeals erred in overruling the plaintiff in error's demurrer to the amended complaint.

II. The Circuit Court of Appeals erred in affirming the action of the trial court in denying the plaintiff in error's motion for a directed verdict.

III. The Circuit Court of Appeals erred in sustaining the trial court in its charge to the jury in the following particulars:

(1) That part of the charge wherein the jury were instructed that the defendant in error was entitled to recover under the Panamanian law.

(2) That part of the charge wherein the jury were instructed that they might bring in a verdict for the defendant in error, although the evidence showed that the plaintiff in error had been careful in the selection of its servants.

(3) That part of the charge wherein the jury were instructed that they were authorized to bring in a verdict for the defendant in

error, although the evidence showed that the acts of plaintiff in error's agents were criminal, if, in fact they were guilty of an illegal act.

The exceptions to the judge's charge, set forth in assignment of error number III. were duly noted in open court, and relate to the following portions of the Judge's charge to the Jury:

"In the next place the defendant sets up certain laws and decisions of the Courts of Colombia and the Courts of Panama as a defense in this action, by virtue of which it claims that in the first place the railroad company is not responsible for the torts of its servants and employees. I take it to mean that if the company has shown proper care in the selection of its agents and servants it is not liable. In the next place it sets up the fact that the operating of a railroad over the streets of a city without ringing the bell and going faster than a horse would go at a moderate trot, constitutes an offense under the police laws of Panama, for which those operating the train might be fined, and its defense in that respect is that a corporation cannot be held responsible for the criminal acts of its agents, which principle the defendant through its counsel, claims has been announced by the Supreme Court of Colombia, and the Supreme Court of Panama. You must take the law from what this Court tells you, and if this Court is in error as to the law it gives you, then the plaintiff or defendant have their rights to appeal to the Court of Appeals at New Orleans, and from there to the Supreme Court of the United States, to see that the law is properly applied. But you, gentlemen, are required to take the law as I give it to you, and I charge you that a railroad corporation is responsible for the negligent acts of its employees, agents and servants, and that it is not the law, as alleged by the defendant, that they are not liable although they may use the greatest care in the selection of their servants, agents and employees. A corporation acts only through its servants, agents and employees, and the law holds the corporation responsible for any illegitimate and direct consequences of a negligent act of any agent, servant or employee, however much care it may have exercised about the selection of that employee.

"Furthermore, I charge you that although a law may make an act of a corporation an offense so that those servants or agents committing it might be fined and dealt with criminally, nevertheless, if injury results to one by reason thereof, and if the act which is at the same time punishable under the criminal or municipal laws is at the same time an act which is negligent, that is, one in which they have failed to exercise the proper care, circumspection and prudence under the circumstances, the company may be held liable notwithstanding the fact that the law also requires a criminal process."

IV. The Circuit Court of Appeals erred in sustaining the trial court in giving the following instruction to the jury:

"Now there is another element in the case as to the permanency of his injuries. He claims that he is permanently disabled, and if you so find you are entitled to allow damages on account of the permanent nature of the injury. He claims also that tuberculosis

of the spine has developed as a result of this injury. Now, we have heard a great deal of medical learning here on that subject, that we all, more or less, have the germs of tuberculosis in our system, and that sometimes it developes as a result of an injury. He claims that this injury developed tuberculosis of the spine. Now, Gentlemen, I charge you as follows: If the plaintiff has developed tuberculosis of the spine as a result of the injuries received, then you may consider the tuberculosis as an element of damages, provided, of course, that you find for the plaintiff. By this I mean to be understood as saying that every person is liable for the natural consequences of its own negligence. It is liable for the consequences that might be reasonably expected to follow or flow from its negligence, its negligent acts, and if one person has troubles peculiar to himself as distinguished from the generality of us, that he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequences of the act resulting to the ordinary individual, and in that connection you have a right to consider what the doctor said that seventy-five or eighty-five per cent have latent infirmities which might be developed as a result of an injury."

V. The Circuit Court of Appeals erred in sustaining the trial court in giving the following charge to the jury:

"If you find for the plaintiff I charge you that physical pain and suffering is an element of damages that you may consider. You may consider physical pain and suffering which the plaintiff has suffered as an element of damages in this case, but it is impossible for any of us to say how much he suffered in dollars and cents; but nevertheless, it is an element of damages in this case."

VI. The Circuit Court of Appeals erred in affirming the judgment of the trial court.

Wherefore, the plaintiff in error prays that the judgment of affirmance of the United States Circuit Court of Appeals be reversed, and that the Supreme Court render such judgment as should have been rendered by the trial court.

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for Plaintiff in Error.

Bond of Writ of Error.

Filed the 8th day of June, 1916.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3203,

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JOSEPH T. TOPPIN, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents that we, the Panama Railroad Company, a corporation, as principal, and United States Fidelity & Guaranty Company as surety, are held and firmly bound unto Joseph T. Toppin, of Colon, Republic of Panama, in the full and just sum of Twelve Thousand Five Hundred and no dollars, to be paid unto the said Joseph T. Toppin, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 8th day of June, in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit, in a suit pending in said Court between the Panama Railroad Company, plaintiff in error, and said Joseph T. Toppin, defendant in error, the said Court, through Circuit Judges Walker and Batts, and District Judge Foster, affirmed the judgment of the District Court of the Canal Zone, which said judgment was rendered against the said Panama Railroad Company and in favor of the said Joseph T. Toppin in the sum of ten thousand dollars United States Currency ($10,000.00), together with costs, and the said Panama Railroad Company has applied to the Circuit Court of Appeals, Fifth Circuit, for a writ of error to review said judgment, having obtained the same, and filed a copy thereof in the Clerk's Office of the said United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph T. Toppin, citing and admonishing him to be and appear at a Supreme Court of the United States of America, at Washington, within thirty days from the date thereof;

Now, therefore, the condition of the above obligation is such. That if said Panama Railroad Company shall prosecute its writ to effect, and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void; else to remain in full force and virtue.

THE PANAMA RAILROAD COMPANY,
A Corporation,
By WALTER F. VAN DAME,
Its Attorney-in-Fact,

UNITED STATES FIDELITY & GUARANTY COMPANY,
Surety.
By L. L. BEBOUT,
Its Attorney-in-Fact.

[Seal of the United States Fidelity & Guaranty Company, Incorporated 1896.]

Bond approved and stay of Execution Ordered.
(Signed) RUFUS E. FOSTER,
Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 157 to 167 next preceding this certificate, contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3203, wherein The Panama Railroad Company is plaintiff in error and Joseph T. Toppin is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 156 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of June, A. D. 1918.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between the Panama Railroad Company, plaintiff in error versus Joseph T. Toppin, defendant in error, a manifest error hath happened, to the great damage of the said Panama Railroad Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, *to* command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 7th day of June, in the year of our Lord one thousand nine hundred and eighteen.

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Allowed by
RUFUS E. FOSTER,
Judge.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the defendant in error.

Dated this 7th day of June, A. D. 1918.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

[Endorsed:] No. 3203. United States Circuit Court of Appeals, Fifth Circuit. The Panama Railroad Company, Plaintiff in error, vs. Joseph T. Toppin, Defendant in error. Writ of Error. U. S. Circuit Court of Appeals. Filed Jun- 7, 1918. Frank H. Mortimer, Clerk.

THE UNITED STATES OF AMERICA:

The President of the United States to Joseph T. Toppin, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty day from the date hereof, pursuant to writ of error sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein the Panama Railroad Company is plaintiff in error versus Joseph T. Toppin, defendant in error, to show cause, if any there be, why the judgment rendered against the said Panama Railroad Company, plaintiff in error, and in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 7th day of June in the year of our Lord one thousand nine hundred and eighteen.

RUFUS E. FOSTER,
United States Judge.

ANCON CANAL ZONE, June 25th, 1918.

The above and foregoing citation was duly served by me at Cristobal, Canal Zone, this day, upon Joseph T. Toppin, defendant in error, by delivering to him a true copy of the same, attested by Frank Mortimer, Clerk of the Circuit Court of Appeals for the Fifth Circuit.

MIGUEL A. OTRID,
United States Marshal for the District of the Canal Zone.

Fee for service $1.00.

[Endorsed:] No. 3203 519 26605. United States Circuit Court of Appeals, Fifth Circuit. The Panama Railroad Company, Plaintiff in error, vs. Joseph T. Toppin, Defendant in error. Citation, and Marshal's return thereon. U. S. Circuit Court of Appeals. Filed Jul- 10, 1918. Frank H. Mortimer, Clerk.

[Endorsed:] File No. 26605. Supreme Court U. S. October Term, 1918. Term No. 519. Panama Railroad Co., P. E., vs. Joseph T. Toppin. Original citation and proof of service of same. Filed July 13, 1918.

Endorsed on cover: File No. 26,605. U. S. Circuit Court Appeals, 5th Circuit. Term No. 519. Panama Railroad Company, Plaintiff in Error, vs. Joseph T. Toppin. Filed June 17th, 1918. File No. 26,605.

BRIEF AND ARGUMENT ON BEHALF OF
PANAMA RAILROAD COMPANY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 519

PANAMA RAILROAD COMPANY,
Plaintiff in Error

versus

JOSEPH T. TOPPIN,
Defendant in Error

SUBJECT INDEX.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

JOSEPH T. TOPPIN, Defendant in Error.

Supreme Court of the United States, No. 519, October Term, 1919.

	Page.
STATEMENT OF THE CASE	3–5
ERRORS ASSIGNED	5–9
PRELIMINARY STATEMENT RESPECTING LEGAL PRINCIPLES APPLICABLE TO CASE	9–14
ARGUMENT UNDER ASSIGNMENT OF ERROR NUMBER ONE.	
1. Basis of assignment	14–15
2. Corporations under laws and decisions of the Republic of Panama are not liable for the penal acts of their servants	16–20
ARGUMENT UNDER ASSIGNMENT OF ERROR NUMBER TWO.	
1. Basis of assignment	20
2. Evidence adduced showing that accident was the result of want of care on the part of the defendant in error	20–21
3. Decision of trial court based on common law principles and not on laws of Panama, as applied by courts of that country	21–22
ARGUMENT UNDER ASSIGNMENT OF ERROR NUMBER THREE.	
1. Basis of assignment	22–24
2. Responsibility of the superior for the acts of his servants is limited to those cases in which the superior has failed to exercise due authority and care over and in the selection of such servant	24–27
3. Evidence adduced relative to character of engineer handling engine which injured defendant in error	27–29

ARGUMENT UNDER ASSIGNMENT OF ERROR NUMBER FOUR.

	Page.
1. Basis of assignment	29–30
2. Evidence adduced relative to permanency of defendant in error's injuries	30–34

ARGUMENT UNDER ASSIGNMENT OF ERROR NUMBER FIVE.

1. Physical pain and mental anguish are not elements of damages under the laws and decisions of the Republic of Panama	34
(*a*) No damages in any case have been allowed by the courts of the Republics of Colombia and Panama for physical pain and mental anguish	34–35
(*b*) Articles of the Civil Code of the Republic of Panama governing measure of damages and comments thereon by the Colombian commentator, F. Velez	35–36
(*c*) Reference made to the provisions of the Chilean Code on the subject of damages for physical pain and mental anguish	37
(*d*) Reference made to decisions of the Supreme Court of Spain on the question of moral damages	37
(*e*) Reference made to the Philippine Reports, where the doctrine of the Spanish law on the question of moral damages is discussed	37
(*f*) Reference to the decision of the Supreme Court of Justice of the Republic of Panama on the question of moral damages in the case of Orozco *vs.* Panama Electric Co.	37
(*g*) Reference made to the decision of the Superior Court of Cundinamarca, Rep. of Colombia, on the question of moral damages, in the case of Leon F. Villaveces *vs.* Municipality of Bogota	38–42
(*h*) Reference to the ruling of the Circuit Court of Appeals in the herein cause on the Panaman rule of decision	42
(*i*) Ruling of the Circuit Court of Appeals in the herein cause, wherein the decision of the Circuit Court of Appeals in the case of Panama Railroad Co. *vs.* Theodore Bosse (239 Fed. 303) was cited on the question of damages for physical pain and suffering, discussed and compared	46
(*j*) Comparison of the jurisprudence of the Canal Zone in the matter of damages compared with the laws and decisions of the Republic of Panama	46–47

REFERENCE TO LAWS, AND STATUTES, REFERRED TO IN BRIEF.

	Page.
Article 5 of Law 62 of Colombia of 1887	18–44

POLICE CODE OF PANAMA.

Articles 488 and 489	15, 19, 42, 44

CIVIL CODE OF PANAMA.

Article 1613	35
Article 1614	35
Article 2341	24, 42
Article 2347	19, 24
Article 2349	24, 25
Article 2358	19

PENAL CODE OF PANAMA.

Article II	18

CIVIL CODE OF CHILE.

Article 2331	37

CIVIL CODE OF SPAIN.

Article 18	37
Article 1903	25

SPANISH AND COLOMBIAN LAWS AND COMMENTARIES.

Siete Partidas, Vol. VII, Law III, Title XXV	18
Article 5, Law 64, of Colombia of 1887	18
Manresa's Commentaries on the Civil Code of Spain, Vol. 12, pp. 617, 618	26
Estudio sobre El Derecho Civil Colombiano, por Fernando Velez, Vol. IX, pp. 13 and 14	36

CASES CITED AND REFERRED TO.

Arayo *vs.* Currel, 1st Louisiana Rep., 528	13
Atchinson, Topeka & Santa Fe Ry. *vs.* Sowers, 213 U. S. 67	10
Baldwin *vs.* People's Ry. Co., 7 Pennew. (Del) 81	33

Page

eckford *vs.* Panama R. R. Co., 231 Fed. 436 22
Cancino *vs.* Railroad of the North, Gaceta Judicial of Colombia, Official Organ of the Supreme Court of Justice, Year XIII, 8-16-89, p. 652 45
Cuba *vs.* Crosby, 222 U. S. 473 43
Fitzpatrick *vs.* Panama R. R., Vol. 2, p. 111, Canal Zone Sup. Ct. Rep 46
Harryman *vs.* Roberts, 52 Md. 64 14
Joy Neff, by next friend, *vs.* City of Cameron, 18 L. R. A. 320 33
Larson *vs.* Boston El. R. R. Co., 212 Mass., 262 32
Malpica *vs.* McKown, 1st Louisiana Rep., 249 13
Matter of Huss, 126, N. Y., 537 13
Marcello *vs.* Velasco, 11 Phill. Rep., 287 37
Northern Pac. Co. *vs.* Freeman, 174 U. S. 379 21
Orozco *vs.* Panama El. Co., Decision of the Supreme Court of Panama of October 5, 1918 26–37
Panama R. R. Co. *vs.* Bosse, 239 Fed. 303 ..... 9, 26, 46
Panama Elec. Co. *vs.* Moyers, 249 Fed. 19 11
People *vs.* Calder, 30 Mich. 85 14
Ramirez *vs.* Panama R. R. Co., Gaceta Judicial of Colombia, Vol. 1, p. 170, yr. 1, No. 22, Bogota, June 10, 1887 ..... 16, 18, 44
Restrepo *vs.* Sabana Ry. Co., Gaceta Judicial of Bogota, No. 353, p. 332, Vol. 8 ..... 17, 44
Slater *vs.* Mexican National R. R. Co., 194 U. S. 120 10
State *vs.* Patterson, 2 Ired. (N. C.) 356 14
Villaveces *vs.* Municipality of Bogota, Sentence of Superior Court of Cundinamarca, Rep. of Colombia, 5-23-'18 ..... 38, 42

SUPREME COURT OF THE UNITED STATES.

THE PANAMA RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOSEPH T. TOPPIN,
Defendant in Error.

No. 519.

Brief and Argument on behalf of the Panama Railroad Company.

STATEMENT OF THE CASE.

The injury complained of by the defendant in error occurred in the city of Colon, within the jurisdiction of the Republic of Panama, on July 4, 1914.

The city of Colon is situated upon a small island called Manzanillo, lying at the Atlantic entrance of The Panama Canal. The island is owned by the Panama Railroad, by virtue of a legislative grant from the Congress of New Granada, now Colombia. The railroad laid out what is now the city of Colon in regular municipal order, with streets and parks.

The thoroughfare upon which the accident complained of occurred is located on the extreme eastern edge of the city of Colon. The thoroughfare is very wide, and runs north and south. Part of the switch yard owned by the plaintiff in error runs through the center of this thoroughfare, from one end to the other. On either side of the switch track, and contiguous thereto, there is a public street running parallel to the track

the full extension of the thoroughfare. The street lying east of the track is called "E" Street, and the one lying west of the track is called "Broadway." The streets running at right angles to this thoroughfare are numbered from 1 to 16. These streets all cross the thoroughfare in question. The accident occurred at the Ninth Street crossing.

The entire area in question is within the political jurisdiction of the Republic of Panama.

The defendant in error, Joseph T. Toppin, was riding a horse on Broadway on July 4, 1914. The horse became unmanageable, and bolted and swerved onto the track of plaintiff in error's railway at the time when one of the latter's engines was coming on the switch track above mentioned, and the defendant in error's horse was struck by the engine and killed, and the defendant in error was injured.

The defendant in error instituted suit in the District Court of the Canal Zone, Cristobal Division, against the plaintiff in error, for damages on account of the injuries received by him.

A demurrer was interposed by plaintiff in error to the defendant in error's amended complaint, which demurrer was overruled by the Court, and plaintiff in error's exceptions noted to such ruling.

Thereafter the plaintiff in error filed an answer to the defendant in error's amended complaint, denying generally and specially the allegations of said complaint, but admitting that the plaintiff in error was a corporation doing business in the Canal Zone; and for special answer plaintiff in error alleged that defendant in error was not entitled to recover under the laws of the Republic of Panama.

The case was tried before a jury. Upon the conclusion of the testimony on behalf of both parties, counsel for the plaintiff in error moved the court to direct the

jury to return a verdict for the plaintiff in error. The court overruled the motion, to which ruling the plaintiff in error excepted.

The plaintiff in error noted several exceptions to the judge's charge to the jury, which will be discussed elsewhere in this brief.

A verdict for the defendant in error for the sum of $10,000 was rendered by the jury. Subsequent to the verdict, a motion for a new trial was filed by the plaintiff in error, which was overruled by the Court, and exceptions were duly noted, and judgment was thereupon entered in conformity with the jury's verdict, which judgment was excepted to by plaintiff in error.

A writ of error was perfected by plaintiff in error to the United States Circuit Court of Appeals at New Orleans. The judgment of the trial court was affirmed by the Appellate Court on April 17, 1918.

A writ of error was perfected to this Court by the plaintiff in error on the 7th day of June, 1918.

Plaintiff in error seeks a reversal of the judgment of the Circuit Court of Appeals on the following assignments of error:

I. The Circuit Court of Appeals erred in overruling the plaintiff in error's demurrer to the amended complaint.

II. The Circuit Court of Appeals erred in affirming the action of the trial court in denying the plaintiff in error's motion for a directed verdict.

III. The Circuit Court of Appeals erred in sustaining the trial court in its charge to the jury in the following particulars:

(1) That part of the charge wherein the jury were instructed that the defendant in error was entitled to recover under the Panamanian law.

(2) That part of the charge wherein the jury were instructed that they might bring in a verdict for the defendant in error, although the evidence showed that the plaintiff in error had been careful in the selection of its servants.

(3) That part of the charge wherein the jury were instructed that they were authorized to bring in a verdict for the defendant in error, although the evidence showed that the acts of the plaintiff in error's agents were criminal, if, in fact they were guilty of an illegal act.

The exceptions to the judge's charge, set forth in assignment of error number III, were duly noted in open court, and relate to the following portions of the judge's charge to the jury:

> "In the next place the defendant sets up certain laws and decisions of the Courts of Colombia and the Courts of Panama as a defense in this action, by virtue of which it claims that in the first place the railroad company is not responsible for the torts of its servants and employees. I take it to mean that if the company has shown proper care in the selection of its agents and servants it is not liable. In the next place it sets up the fact that the operating of a railroad over the streets of a city without ringing the bell and going faster than a horse would go at a moderate trot, constitutes an offense under the police laws of Panama, for which those operating the train might be fined, and its

defense in that respect is that a corporation can not be held responsible for the criminal acts of its agents, which principle the defendant, through its counsel, claims has been announced by the Supreme Court of Colombia, and the Supreme Court of Panama. You must take the law from what this Court tells you, and if this Court is in error as to the law it gives you, then the plaintiff or defendant have their rights to appeal to the Court of Appeals at New Orleans, and from there to the Supreme Court of the United States, to see that the law is properly applied. But you, gentlemen, are required to take the law as I give it to you, and I charge you that a railroad corporation is responsible for the negligent acts of its employees, agents, and servants, and that it is not the law, as alleged by the defendant, that they are not liable although they may use the greatest care in the selection of their servants, agents, and employees. A corporation acts only through her servants, agents and employees, and the law holds the corporation responsible for any illegitimate and direct consequences of a negligent act of any agent, servant or employee, however much care it may have exercised about the selection of that employee.

"Furthermore, I charge you that although a law may make an act of a corporation an offense so that those servants or agents commit-

> ting it might be fined and dealt with criminally, nevertheless, if injury results to one by reason thereof, and if the act which is at the same time punishable under the criminal or municipal laws is at the same time an act which is negligent, that is, one in which they have failed to exercise the proper care, circumspection and prudence under the circumstances, the company may be held liable notwithstanding the fact that the law also requires a criminal process."

IV. The Circuit Court of Appeals erred in sustaining the trial court in giving the following instructions to the jury:

> "Now there is another element in the case as to the permanency of his injuries. He claims that he is permanently disabled, and if you so find you are entitled to allow damages on account of the permanent nature of the injury. He claims also that tuberculosis of the spine has developed as a result of this injury. Now, we have heard a great deal of medical learning here on that subject, that we all, more or less, have the germs of tuberculosis in our system, and that sometimes it developes as a result of an injury. He claims that this injury developed tuberculosis of the spine. Now, gentlemen, I charge you as follows: If the plaintiff has developed tuberculosis of the spine as a result of the injuries received, then you may consider the tuberculosis as an element of damages, provided, of course, that you find for the plaintiff. By this I mean to be understood as saying that every person is liable for the natural

consequences of its own negligence. It is liable for the consequences that might be reasonably expected to follow or flow from its negligence, its negligent acts, and if one person has troubles peculiar to himself as distinguished from the generality of us, that he suffers peculiar troubles peculiar to himself as distinguished from the generality of us, that he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequences of the act resulting to the ordinary individual, and in that connection you have a right to consider what the doctor said that seventy-five or eighty-five per cent have latent infirmities which might be developed as a result of an injury."

V. The Circuit Court of Appeals erred in sustaining the trial court in giving the following charge to the jury:

> "If you find for the plaintiff I charge you that physical pain and suffering is an element of damages that you may consider. You may consider physical pain and suffering which the plaintiff has suffered as an element of damges in this case, but it is impossible for any of us to say how much he suffered in dollars and cents; but nevertheless, it is an element of damages in this case."

VI. The Circuit Court of Appeals erred in affirming the judgment of the trial court.

Several of the issues arising in this case were passed on by this Court in the case of the Panama Railroad Company *vs.* Bosse, and a decision adverse to the plaintiff in error was rendered on March 3, 1919.

The Bosse case, however, arose in the Canal Zone, and in deciding the issues in that case this Court declined to follow the rule of decision of the courts of Colombia and Panama in interpreting the Colombian Civil Code now in force in the Canal Zone, and applied the rule of the common law that holds a master answerable for the torts of his servant, committed within the scope of his employment.

The case now before this Court arose within the jurisdiction of the Republic of Panama, that is to say, in a foreign jurisdiction, where the rules of the common law find no place. The laws of Panama, as interpreted by the courts of that country, are controlling in this case.

> "As the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (Smith *vs.* Dondry, I How. 28), but equally determines its extent. It seems to us unjust to allow the plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability the law would impose. (*Slater* vs. *Mexican National R. R. Co.*, 194 U. S., page 120; *Atchinson, Topeka & Santa Fe Ry.* vs. *Sowers*, 213 U. S., p. 67)."

The charge to the jury (Pages 132 to 140 of the record), as well as the trial judge's written opinion upon plaintiff in error's motion for a new trial (pages 67 to 72 of the record) indicate that he applied the rule of decision of the courts of the Canal Zone, and in conformity with principles of the common law, without regard to the rules and decisions of the Panamanian courts.

Since this case was tried, a considerable number of cases sounding in tort, arising in the Republic of Pana-

ma and elsewhere in Latin America, have been instituted in the courts of the Canal Zone; and in practically all of the cases the plaintiffs, like the defendant in error, are aliens and non-residents. The cases involve other enterprises besides the plaintiff in error.

Steamship companies, oil companies, the Tramway Company, and the Cable Company are doing business in the Canal Zone with offices therein. The decision in this case by the trial court is inviting litigation against all of these corporations in the Canal Zone, notwithstanding the causes of action arose in a foreign jurisdiction.

The juries, in trials of cases in the District Court of the Canal Zone, are made up of employees of the government and of the Panama Railroad Company. The Treasury of the United States is taxed in the trial of these cases, and the employees of the government are taken from their occupations for the purpose of trying out issues in the Canal Zone courts that should properly come up before the foreign tribunal within whose jurisdiction the cause of action arose. As was said by the United States Circuit Court of Appeals for the Fifth Circuit in a recent case:

> "There are many excellent reasons why the courts of the Canal Zone should not take jurisdiction of cases arising in Panama, especially where it is not shown that either party is a citizen of the United States. The courts of Panama are easily accessible, and, it must be assumed, better qualified to determine and apply the laws of that country than are the courts of the United States." (*Panama Electric Company* vs. *Moyers*, 249 Fed., page 19.)

The Canal Zone formed a part of the territory of Panama prior to the cession to the United States, and we take it that the courts of the United States will take judicial knowledge of the laws and decisions of the

Republic of Panama, and Colombia, of which Panama formed a part, which laws and decisions were in force in Panamanian territory on February 26, 1904, when The Panama Canal treaty was proclaimed.

And we submit further that our courts will presume that those laws and decisions were still in force in the Republic of Panama at the time that the cause of action alleged herein accrued, unless the contrary appears by affirmative evidence in the record of this case. As was said by the Supreme Court of Louisiana:

> "When countries have once belonged to the same government, and the same rules prevailed in both, it is not understood by us that the separation of the countries, renders the laws in existence, at the time they divided, foreign to each other. The act of political separation does not destroy the knowledge possessed in both, that they were subject to the same law, and what that law was. Any change made in it after the countries became independent of each other; any new statute passed in either, would certainly come under the general rule. Because it was at no time common to both. But those laws which were, stand on quite a different footing. The rule, like every other in regard to evidence, is founded on good sense. Courts require proof of the laws of another country, because they do not judicially possess the means of knowing them. But when they do possess judicial knowledge of them, there seems no object in requiring evidence of that, which is already known. We have looked into the jurisprudence on this head, and we do not discover that the different States in the Union require proof the common law prevails in each. Or that it has ever been deemed necessary to establish by testimony, that the same system governs in England. It is true they require proof of British statutes, which never were in force within their own state, but this is in the distinction already

alluded to. It is a matter of history, that certain countries formed part of the same kingdom or government, of which, courts of justice take notice, without evidence; and if it be a fact that the countries separated were at one time under the same government, proof of the law at the time of separation is vain, and of no use; for the court knows its own law, which was the law of both.

"We, therefore, think the laws of Spain may be referred to, and considered in the decision of the cause, although they have not been proved as facts." (*Malpica* vs. *Mc Kown*, 1st Louisiana Rep., Page 249, opinion pages 255 and 256.)

The same court announced the doctrine in the following language in another case:

"When a court knows nothing of the laws of a country, it presumes them to be the same as those of its own. This is the general rule, and the presumption rests upon the ignorance in which it is of any other. If it has judicial knowledge of the law of a particular country, the presumption does not exist. If it has knowledge of what the law once was, it presumed it was not abrogated till this be shown. Having judicial knowledge of the law of Louisiana before the retrocession, and that the law of New Spain was the same, we have the knowledge of the latter, at the retrocession, and must presume it unchanged, till the change be shown." (*Arayo* vs. *Currel*, 1st Louisiana Reports, page 528, opinion page 541.)

The Court of Appeals of the State of New York held that when a law is once shown to have existed in a foreign jurisdiction, it continued the same until the time of the event about which the controversy turned, unless the contrary be shown. (Matter of Huss, 126 N. Y., 537.) The Court, in support of its ruling cited the following authorities: Greenleaf on Evidence, Vol. 1, Sec. 41; People *vs.* Manhattan Co., 9 Wendell 351;

People *vs.* Calder, 30 Mich. 85; Harryman *vs.* Roberts, 52 Md. 64; State *vs.* Patterson, 2 Ired. (N. C.) 356.

It is the contention of the plaintiff in error that under the laws and decisions of Panama and Colombia in force in the Republic of Panama on February 26, 1904, the defendant in error could not have recovered against the plaintiff in error in this case, and that those laws and decisions continued to exist in the Republic on July 4, 1914, when the alleged cause of action accrued, there being no evidence in the record to the contrary.

The assignments of error will now be discussed in their order.

FIRST ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in overruling the plaintiff in error's demurrer to the amended complaint.

Stripped of all conclusions, the amended complaint charges that the defendant in error was riding a horse along Broadway in the city of Colon, and when near the Ninth Street crossing the horse became unmanageable and bolted and swerved and attempted to cross Broadway at the Ninth Street crossing, and in spite of all that defendant in error could do the horse got upon the crossing and plaintiff in error's track when the engine ran into and against the horse, killing him and injuring defendant in error; and that the engine was running at a speed in excess of that allowed by law, when the horse was struck. (Pages 43 and 44 of the record.)

There are no allegations in the amended complaint upon which to base a conclusion that the accident would not have happened had the engine been run at a moderate rate of speed. The only conclusion authorized by the allegations properly pleaded is that the horse ran into and against the engine. It is true that the amended complaint states that the engine was being

operated at a careless, reckless and unlawful rate of speed, but the statement is simply a conclusion and does not add to the facts properly charged in the complaint. The amended complaint also states that plaintiff failed to provide any protection whatever, and operated the engine without ringing any bell or sounding any whistle or warning. The horse was traveling along Broadway, which runs parallel with the railroad track, and was not approaching the track along a side street. A gate or flagman on Broadway would not have prevented the horse from bolting, and certainly the failure on the part of the engine crew to ring the bell or sound the whistle or other warning did not cause the horse to bolt.

The amended complaint states that the defendant in error's injuries were due wholly to the carelessness and negligence of the plaintiff in error, the defendant being without fault or blame. Again, we say that the statement is a conclusion, and in no manner helps the averments properly pleaded, which authorize the conclusion that the proximate cause of the accident was the horse's bolting onto the track and running against the engine.

We respectfully submit that the amended complaint does not state a cause of action, and the demurrer should have been sustained.

Again, we say that the amended complaint does not state a cause of action against the plaintiff in error for this: The complaint charges that the engine was operated at an unlawful rate of speed, and that no bell was rung, or whistle or other warning sounded, all in contravention of Articles 488 and 489 of the Police Code of Panama. The liability imposed by the articles of the Police Code is upon the conductor, and the administrator of the company subsidiarily, and not at all upon the plaintiff in error. Therefore, our demurrer should have been sustained.

And in support of the first assignment of error we desire to add that under the laws and decisions of Panama and Colombia a civil suit can not be maintained against a corporation for the penal acts of its servants and employees. We refer the court to the case of Felipe Ramirez, Isidoro Burgos, his attorney, plaintiff, *vs.* The Panama Railroad Company, which is set out in full on pages 9 to 28 of the record. The facts in the case of Ramirez *vs.* The Panama Railroad Company were as follows:

The plaintiff, Felipe Ramirez, was an employee of the French Canal Company, and seems to have had some duties in connection with the company's mail. He boarded one of the trains of the Panama Railroad Company and was ordered to get off by the conductor. He insisted that he had a right to ride, because he was an employee of the Canal Company, and was thus entitled to transportation under agreements between the two companies. He failed to satisfy the conductor upon this point, and the latter ejected him from the train, causing him serious bodily injury to the extent of the loss of one of his legs. The plaintiff claimed 60,000 pesos as damages from the company by reason of the unlawful act of the conductor. A judgment was rendered by the trial court against the Panama Railroad Company, which the latter appealed to the Superior Court of the State of Panama. The judgment of the trial court did not fix the amount of the damages, and upon that point the plaintiff took a cross appeal to the Superior Court. The Superior Court expressed the opinion that the conductor was liable for the injury to the plaintiff, and not the railroad company, because the act of the conductor was criminal; and the court further held that no recovery could be had even against the conductor until after a verdict of guilty had been obtained against him in a criminal proceeding. The court also held that the

Panama Railroad Company was not liable under the Code of Commerce, because the plaintiff had failed to prove a contractual relation between him and the company, inasmuch as he had exhibited no ticket authorizing his transportation nor any contract between the two companies which would authorize him to ride upon the railroad company's trains. This case recognizes the distinction between obligations arising *ex delicto* and those arising *ex contractu*. The proof showed an obligation arising *ex delicto*, but that obligation was in effect held to be personal and belonging to the conductor only. Evidence was lacking to show an obligation *ex contractu* on the part of the railroad company.

We would also call the Court's attention to the case of Ruperto Restrepo *vs.* The Sabana Railway Company (La Compania del Ferrocarril de la Sabana), decided by the Supreme Court of Justice of Colombia on July 19, 1892, a full translation of which is set out on pages 31 to 41 of the record, wherein it was held that a corporation can not be guilty of a penal offense, and therefore, is not liable in damages for acts or omissions, penal in their nature, of its employees. The facts of the case are as follows:

The railway company was sued for damages on account of the unlawful taking of land belonging to the plaintiff, by the administrator of the company for use as a right of way; and also on account of the killing of plaintiff's cattle by the defendant company's train upon its right of way.

The attempt to recover from the railroad company for the tresspass upon the land was denied, upon the ground that such a trespass was a criminal act, and that the company could not be held responsible for it, inasmuch as an artificial entity, such as a corporation, could not be held guilty of an intentional wrong; that

the responsibility for the invasion of the plaintiff's land was upon the manager of the company. Damages were allowed Restrepo for the killing of his cattle by the company's train, upon the ground that the railroad was negligent in not fencing its right of way against cattle.

The doctrine that guilt is personal has prevailed in Spanish law for centuries, and is part of the philosophy of most Spanish-speaking countries, including Colombia and Panama. We find it expressed in the old Penal Code of Panama, as set out in the Ramirez case against the Panama Railroad Company, already referred to in this brief. Article II of that code reads as follows:

> "The responsibility which carries with it a penalty is purely personal and can never be extended to those who are not culpable." (Page 17 of the Record.)

If we look to the Siete Partidas, the ancient code of Spain, for light upon this subject, we find that accountability for the commission of a tort belonged to the person who committed it or caused it by his fault, command or counsel. Law III, Title XXV, Partida VII, provides:

> "He who causes the damage shall make repairs to the one receiving the damage, and this can be required of anyone who had done the damage with his own hands or caused it by his fault, command, or counsel."

The Supreme Court of Colombia had occasion to pass upon the question of the liability of a corporation for the penal acts of its employees with reference to Article 5 of Law 64 of 1887, in a case decided by that court as late as the 14th of May, 1917. The suit was instituted against the Colombian National Railway Co., Ltd., for the recovery of damages on account of the burning of certain pastures belonging to the plaintiff, by sparks

from the defendant company's locomotives. The attempt was made in that case to show that the act was a penal offense, and therefore, the company was not liable for the acts of its employees. The court declined to hold that the act was penal, and held that it came under the provisions of Article 2347 of the Civil Code, which holds empresarios responsible for the acts of their employees, as well as under the provisions of Article 5 of Law 64 of 1887. The case was decided on the issue of limitation or prescription raised by the defendant company. The court held that the general rules of limitation prescribed by the Civil Code were applicable, and not those of the penal code. In discussing the issue the court said:

> "The associations or moral persons, among which is to be found the defendant company, not being criminally responsible, it is evident that the limitation of civil actions prescribed against them is not controlled by Paragraph 1 of the Article cited." (*Gaceta Judicial of the Republic of Colombia*, year XXVI, No. 1340, Page 61.)

The paragraph referred to is number 1 of Article 2358 of the Civil Code of Colombia, which is the same as the Civil Code of the Canal Zone, and relates to the limitation of civil actions arising from offenses of a penal character, instituted against the one directly responsible for the act.

It might be well to add that Articles 488 and 489 of the Police Code of Panama which holds the conductor, and the administrator of the company subsidiarily, liable for a violation of their provisions, are merely declaratory of the pre-existing law. The Police Code is a local enactment of the Assembly of the Department of Panama, approved August 26, 1896, and is known as Ordinance Number 87, and is one of the laws in force in the Canal Zone when the Panama Canal treaty was

made and is, therefore, within the judicial knowledge of this Court. The language of the articles of the Police Code clearly limit the liability to the conductor, and the administrator of the company subsidiarily, and imposes no liability upon the company.

Again we say that our general demurrer to the amended complaint should have been sustained.

SECOND ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in affirming the action of the trial court in denying the plaintiff in error's motion for a directed verdict.

This assignment of error was based upon plaintiff in error's motion for a directed verdict, which was overruled, as will appear on page 131 of the record.

In support of this assignment of error we respectfully refer the Court to what has been said in this brief in support of the plaintiff in error's first assignment of error.

We submit that upon the evidence adduced by both parties, the plaintiff in error was entitled to a directed verdict, because the evidence showed that the accident was the result of the want of care on the part of the defendant in error. He had ample opportunity to leave the place of danger before his horse was struck by the engine. The witness, Downes, who testified on behalf of defendant in error said that the horse wanted to go across the track in the direction of the stable, and that Toppin pulled the horse the other way. (Page 78 of the Record.) And again, the witness Pellage testified for the defendant in error that the rider was trying to turn the horse from the track to the west, and that the stable was on the other side of the track. (Page 81 of the record.) The defendant in error himself testified to the fact that he saw the engine one block away at 8th Street, and

this was at a time when someone yelled out to him "Look out, Toppin," and yet he made no effort to dismount from the horse in order to avoid the oncoming engine. His statement that the horse stood upon the track, pulling and rearing up and prancing around, and yet remained on the track, would seem to be highly improbable, but if true, it would not relieve the defendant in error of the duty to abandon the horse and leave the track, as he could have done, before the engine reached him. As was stated by this Court in the case of Northern Pacific Railway Company *vs.* Freeman, 174 U. S., page 379, opinion page 383:

> "When it appears that if proper precautions were taken they could not have failed to prove effectual, the court had no right to assume, especially in the face of all the oral testimony, that such precautions were taken."

The trial court, in overruling our motion for a directed verdict, was guided by the decisions of the Canal Zone Court, based upon common law principles, and not by the laws of Panama as understood and applied by the courts of that country. That this is so will appear from an examination of the trial judge's written opinion overruling our motion for a new trial. (See pages 67 to 72 of the record). In that opinion, in passing on the question of the plaintiff in error's liability for the acts of its servants, the trial court said:

> "As this proposition of law has been repeatedly decided by this Court and the Supreme Court of the Canal Zone, and has been expressly affirmed by the United States Circuit Court of Appeals in the case of Beckwith (Beckford) *versus* the Panama Railroad Company and Bosse *versus* the Panama Railroad Company, this alleged error need not be further discussed here." (Page 68 of the record):

The case of Beckford *vs.* Panama Railroad Company, cited by the trial judge, has no application to this case. Beckford was an employee of the Panama Railroad, and was injured in the Canal Zone, while at work for the railroad company. His case rested upon the Federal Employers' Liability Act of Congress. The Panama laws had nothing to do with his case. (Beckford *vs.* Panama Railroad Company, 231 Federal Reporter, page 436.) The case of Bosse *vs.* The Panama Railroad Company arose in the Canal Zone, and has already been passed on by this Court; and, as is known to this Court, the case was disposed of in conformity with the common law rules of Master and Servant. The case can not serve as authority in deciding issues in the Republic of Panama.

THIRD ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in sustaining the trial court in its charge to the jury in the following particulars:

(1) That part of the charge wherein the jury were instructed that the defendant in error was entitled to recover under the Panamanian laws.

(2) That part of the charge wherein the jury were instructed that they might bring in a verdict for the defendant in error, although the evidence showed that the plaintiff in error had been careful in the selection of its servants.

(3) That part of the charge wherein the jury were instructed that they were authorized to bring in a verdict for the defendant in error, although the evidence showed that the acts of plaintiff in error's agents were criminal, if, in fact they were guilty of an illegal act.

This assignment of error is based upon the following portions of the trial court's charge to the jury:

"The answer of the defendant is twofold. In the first place it constitutes a general denial

of each and every one of the allegations of the plaintiff and demands strict proof, which it has a right to do. In the next place the defendant sets up certain laws and decisions of the Courts of Colombia and the Courts of Panama as a defense in this action, by virtue of which it claims that in the first place the railroad company is not responsible for the torts of its servants and employees. I take it to mean that if the company has shown proper care in the selection of its agents and servants it is not liable. In the next place it sets up the fact that the operating of a railroad over the streets of a city without ringing the bell and going faster than a horse would go at a moderate trot, constitutes an offense under the police laws of Panama, for which those operating the train might be fined, and its defense in that respect is that a corporation can not be held responsible for the criminal acts of its agents, which principle the defendant, through its counsel, claims has been announced by the Supreme Court of Colombia and the Supreme Court of Panama. You must take the law from what this Court tells you, then the plaintiff or defendant have their rights to appeal to the Court of Appeals at New Orleans, and from there to the Supreme Court of the United States, to see that the law is properly applied. But you, gentlemen, are required to take the law as I give it to you, and I charge you that a railroad corporation is responsible for the negligent acts of its employees, agents, and servants, and that it is not the law, as alleged by the defendant, that they are not liable although they may use the greatest care in the selection of their servants, agents, and employees. A corporation acts only through her servants, agents and employees, and the law holds the corporation responsible for any illegitimate and direct consequence of a negligent act of any agent, servant, or employee, however much care it may have exercised about the selection of that employee.

"Furthermore, I charge you that although a law may make an act of a corporation an offense so that those servants or agents committing it might be fined and dealt with criminally, nevertheless, if injury results to one by reason thereof, and if the act which is at the same time punishable under the criminal or municipal laws is at the same time an act which is negligent, that is, one in which they have failed to exercise the proper care, circumspection and prudence under the circumstances, the company may be held liable notwithstanding the fact that the law also requires a criminal process." (Pages 133 and 134 of Record.)

The suggestions advanced under the first and second assignments of error apply with equal force to the first paragraph of the third assignment of error.

The second paragraph of the third assignment of error, goes to that part of the charge to the jury wherein they were instructed that they might bring in a verdict for the defendant in error, although the evidence showed that the plaintiff in error had been careful in the selection of its servants. While the charge to the jury conforms to the common law rule, it contravenes the provisions of the Civil Code, as understood and applied by the courts of the Republic of Panama, as well as those of Spain.

Section 2341 of the Civil Code limits the liability to the person who causes the damage. The responsibility for the acts of third persons is to be found in the provisions of Articles 2347 and 2349 of the Civil Code of the Canal Zone, identical with those of the Civil Code of Panama in force at the time that the cause of action in this case accrued. The last paragraph of Article 2347 provides, in effect, that the responsibility of the empresario shall cease if it appears that by the exercise of proper care and authority he could not have prevented the act complained of. No reference was made to this para-

graph of Article 2347 by this Court in its decision in the Bosse case.

This court held, in the Bosse case, that Article 2349 of the Civil Code may be taken to refer to acts outside of the scope of the employment of the servant or employee. The ruling of the Court was based on the common law, which, the Court said, was not inconsistent with the language of Article 2349 of the code. We respectfully submit that the ruling was not in keeping with the Spanish doctrine which holds that guilt is personal, and can not be extended to anyone not at fault. The rule of the common law is based on the theory of agency. That is not the philosophy of the Spanish law. We are not here referring to the status of the board of directors or other governing board, which for the purpose of the law is the corporation, but we have in mind employees whose status, under the Spanish law, is one of dependency.

Article 1903 of the Spanish Civil Code is in substance the same as Articles 2347 and 2349 of the Civil Code of the Canal Zone and of Panama. Like these two articles of the code of the Canal Zone and Panama, it provides that the owners and directors of establishments and enterprises shall be responsible for the damages caused by their dependents in the service in which they are employed; and the last paragraph of the article provides that the responsibility shall cease when the persons charged have proved that they had employed all of the diligence of a good father of family to prevent the damage.

Dr. José María Manresa y Navarro, one of the most eminent commentators on the Civil Code of Spain, has the following to say in respect to the meaning of Article 1903 of the Spanish Civil Code:

> "Our code has not followed the Italian school, but has been inspired rather in the criterion of the

French doctrine inasmuch as it imposes the obligation to repair the damage caused in virtue of a persumption *juris tantum* of fault on the part of the person who has under his authority or dependency the one who caused the damage, derived from the fact that he had not employed due care and diligence over the acts of his subordinates to prevent said result. And so it is that, in accordance with the last paragraph of article 1903, *said responsibility ceases when it is proven that those who are responsible for the acts of others have employed all the diligence of a good father of family. Therefore, the representation is not the cause of the obligation*, nor is the interest, nor the necessity that there should be someone responsible for the damage caused by one who was irresponsible and without guarantees of solvency to repair the damage done himself, but it is the non-compliance, tacit or supposed, with the duties of precaution and prudence imposed by civil ties that unite the obligated party with the persons on whose account he should repair the damage done. For that reason it, the Code, places the obligation among those that come from fault or negligence." (Manresa's Commentaries on the Civil Code of Spain, Vol. 12, pages 617 and 618. The translation and underscoring are ours.)

This language of Dr. Manresa has been cited with approval by the Supreme Court of Panama in the case of Orozco *vs.* Panama Electric Company, decided on October 5, 1918, and a full translated copy of which will be found on pages 167 to 193 of our brief in case No. 522, Panama Railroad Company, plaintiff in error, *vs.* Theodore Bosse, defendant in error, to which we respectfully refer the Court, and especially to page 188 of said brief, where the quotation from Dr. Manresa's work will be found.

Again, we would refer the Court to the notes of Señor Bello on the Civil Code of Chile, from which code

that of Colombia was copied. In discussing the limitations upon the liability of the Master for the acts of his servants, Señor Bello states the doctrine as follows:

> "For example, a coach collides with a person or breaks a window or door, due to the malice or negligence of the coachman. The master could have foreseen the damages that might be caused by a vicious inexperienced coachman, but if a coachman of habitual good conduct should become intoxicated upon one occasion and in that state runs against a pedestrian or insults him, the master not being present, or being present is disobeyed, what can be imputed to the latter?"

We respectfully refer the Court to Page 187 of our brief in the Bosse case, already mentioned, for this quotation from Senor Bello's work.

The witness S. W. Heald, Superintendent of the Panama Railroad, who testified for the plaintiff in error, gave evidence as to the character and efficiency of the engineer, Moorfoot, and stated that he had known him since 1908 and he had occasion to observe his work; that he was as good a colored engineer as they had; and that he had always found him a good careful man. (Pages 91 to 93 of the record.)

Martin B. Connolly, Roadmaster for the Panama Railroad Company, a witness for the plaintiff in error, testified that he had known Engineer Moorfoot for many years, and had occasion to observe his efficiency as a locomotive engineer; that he was a good steady, conscientious man, so much so that when the witness wanted a man for a particular job he always asked for Moorfoot, because he considered him reliable. During the fifteen years that he knew Moorfoot he always stood well with everybody, and he was sober and reliable. (Pages 115 to 116 of the record.)

The engineer, Moorfoot, testified for the plaintiff in error, and gave a clear statement of his services with

the railroad since 1905, and explained in detail how the accident in question happened, and he was not even cross-examined by the opposing side. (Pages 118 and 119 of the record.)

The testimony established the fact that the engineer was a careful and competent man, and not the slightest evidence was submitted to impeach the character or efficiency of Engineer Moorfoot. The issue thus presented was material, and it should have been submitted to the jury under proper instructions. The Court failed to submit the issue to the jury, and on the contrary charged them as follows:

> "I charge you that a railroad corporation is responsible for the negligent acts of its employees, agents and servants, and that it is not the law as alleged by the defendant that they are not liable although they may use the greatest care in the selection of their servants, agents, and employees. A corporation acts only through her servants, agents, and employees, and the law holds the corporation responsible for any illegitimate and direct consequence of a negligent act of any agent, servant, or employee, however much care it may have exercised about the selection of that employee." (Page 134 of the record.)

The third paragraph of the third assignment of error is based on the following portion of the trial court's charge to the jury:

> "Furthermore, I charge you that although a law may make an act of a corporation an offense so that those servants or agents committing it might be fined and dealt with criminally, nevertheless, if injury results to one by reason thereof, and if the act which is at the same time punishable under the criminal or municipal laws is at the same time an act which is negligent, that is, one in which they have failed to exercise the proper care, circumspection, and prudence under the

circumstances, the company may be held liable notwithstanding the fact that the law also requires a criminal process."

Our suggestions and arguments upon assignments of error Nos. 1 and 2 cover our objections to the portion of the court's charge just quoted.

FOURTH ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in sustaining the trial court in giving the following instructions to the jury:

> "Now there is another element in the case as to the permanency of his injuries. He claims that he is permanently disabled, and if you so find you are entitled to allow damages on account of the permanent nature of the injury. He claims also that tuberculosis of the spine has developed as a result of this injury. Now, we have heard a great deal of medical learning here on that subject, that we all, more or less, have the germs of tuberculosis in our system, and that sometimes it develops as a result of an injury. He claims that this injury developed tuberculosis of the spine. Now, gentlemen, I charge you as follows: If the plaintiff has developed tuberculosis of the spine as a result of the injuries received, then you may consider the tuberculosis as an element of damages, provided, of course, that you find for the plaintiff. By this I mean to be understood as saying that every person is liable for the natural consequences of its own negligence. It is liable for the consequences that might be reasonably expected to follow or flow from its negligence, its negligent acts, and if one person has troubles peculiar to himself as distinguished from the generality of us, that he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequences of the act resulting to the

> ordinary individual, and in that connection you have a right to consider what the doctor said that seventy-five or eighty-five per cent have latent infirmities which might be developed as a result of an injury." (Page 139 of the record.)

The charge was objectionable because it authorized the jury to believe that defendant in error had latent tuberculosis at the time of the alleged injury on the assumption that seventy-five or eighty-five per cent of the people have latent infirmities which might be developed as a result of an injury. There is no evidence in the record to sustain the trial court's statement to the jury. The witness, Dr. Taylor, testifying as an expert witness, in reply to a question said:

> "It may be a fact that some medical authorities claim that eighty-five per cent of the human beings have the germs lying latent in their systems, but I am not in a position to state that that is so. I don't remember having read the authorities." (Page 95 of the Record.)

Neither this statement nor any other statement made by the two doctors who testified in the case authorized the language employed by the trial judge in his charge to the jury.

There was no evidence in the case tending to prove that the defendant in error had the germs of tuberculosis in his system at the time he received the injuries complained of. The witness, Dr. Taylor, declined to so testify, and the uncontroverted evidence in the case showed that nearly six months had expired from the date of the injuries before it was discovered that the defendant in error had tuberculous abscesses. The testimony submitted by the defendant in error, taken from medical textbooks, showed that bone tuberculosis develops from an injury to the bone within six weeks, and not after three months at the farthest. These same authorities hold that tubercu-

losis of the bone only develops from slight injuries. The evidence submitted by defendant in error shows that he was seriously injured, so much so that he was confined to his house, and later in the hospital, from the time of the injury until September, 1915, when he became able to get around.

There are no decisions of the courts of Panama or Colombia bearing on the question submitted under this assignment of error, and in consequence, we may seek light on this question from the jurisprudence of the United States or elsewhere.

There is considerable conflict among the authorities as to whether or not the development of a latent disease from a physical injury may be treated as an element in assessing damages; but those favoring the assessment of damages appear to be unanimous in holding that in order to allow such damages it must appear that the germs of the disease were in the injured person's system at the time he received the injuries. Otherwise he would not be entitled to damages on that score, that is to say, no damages are allowed for an infection occurring after the injuries are received.

In speaking of these cases, Wharton & Stillé, in their work on Medical Jurisprudence, Volume 3, Page 195, state as follows:

> "Under any ordinary circumstances outside of surgical operations, the responsibility for such an infection can not be laid upon the one who inflicts the wound, as the disease germs are widely spread throughout the air, earth, water, and other substances that come in contact with the wound under normal circumstances."

If it should be held that the defendant in error was entitled to a charge to the jury upon the issue as to

whether or not the tubercular condition of the bone was the result of the injury received by him, then we submit that the instruction given was fundamentally erroneous because it ignores the testimony, submitted on behalf of the defendant in error, taken from the medical textbooks as well as the statement of the witness Dr. Taylor, to the effect that the diseased condition of the bone must have developed within three months after the defendant in error received the injuries—otherwise the disease could not be attributed to those injuries; and the plaintiff in error was entitled to an instruction advising the jury that if the tubercular condition of the bone was caused by something independent of the original injury and which as a new and independent cause intervened after the injury, then the jury would not be authorized to consider the diseased condition of the bone as an element to enhance the damages, if any, in favor of the defendant in error.

In support of this proposition we refer the Court to the case of Larson *vs.* Boston El. R. R. Co., 212 Mass., page 262, and cited in Negligence Compensation Cases Annotated, Volume 9, page 103, Note XIII. The Court in that case instructed the jury that if at the time the plaintiff was injured there were germs of tuberculosis in her system, and if the direct consequence of her injuries was to lessen her general health, and cause weakness and reduce her powers of resistance to the toxic effect of these germs, and if solely by reason thereof the tuberculosis which had been merely latent in her system became developed into an existent disease, as on evidence the jury were warranted in finding, they would then have a right to find that the tuberculosis was a direct and immediate result of her injuries and to assess damages therefor. If, however, her tuberculosis came from germs introduced into her system after she had sustained these injuries, or by the operation of some

subsequent and independent cause, then, even though the disease would not have developed and manifested itself but for her physical condition having been weakened and her power of resistance diminished by those injuries, it well may be that she could not recover damages for that sickness and its consequences. The Supreme Court sustained the instruction as given by the trial court.

In the case of Baldwin *vs.* People's R. Co., 7 Pennew. (Del.) 81, the trial court charged the jury that no recovery could be had for the effects of tuberculosis or any other disease, contracted before the accident, unless the jury were clearly satisfied from the evidence that such disease was aggravated or increased by the negligent act of the defendant, and even then recovery could be had only to the extent that such effects were so aggravated or increased * * * "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation; did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? Unless the evidence of the plaintiff is sufficient to show the connection between the immediate cause of the death and the injury received, the plaintiff can not recover for the effects or consequences of the disease that caused the death." This case is cited in Note 1 on page 92, Volume 9 of "Negligence Compensation Cases Annotated," already referred to in this brief. We also refer the Court to the case of Joy Neff, by next friend, *vs.* The City of Cameron, decided by the Supreme Court of Missouri, and reported in 18 L. R. A., p. 320.

The charge of the Court was erroneous in submitting to the jury the issue as to whether or not the defendant

in error was permanently disabled. Dr. Taylor, a witness for the defendant, and the only witness upon that point, did not testify that the injury was permanent. On that point Dr. Taylor testified as follows:

> "As to his condition now about being able to work, I think he ought to be able to do a certain amount of work. I don't know how much that ought to incapacitate him, but he ought to be able to do a certain amount of work if he would sit down when he had a chance, that is in saloon work." (Page 107 of the record.)

FIFTH ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in sustaining the trial court in giving the following charge to the jury:

> "If you find for the plaintiff I charge you that physical pain and suffering is an element of damages that you may consider. You may consider physical pain and suffering which the plaintiff has suffered as an element of damages in this case, but it is impossible for any of us to say how much he suffered in dollars and cents; but nevertheless, it is an element of damages in this case."

This Court held in the case of Panama Railroad Co. *vs.* Bosse, already referred to, that damages for physical pain and suffering could be recovered in the Canal Zone courts; but the Bosse case arose in the Canal Zone, and in that respect differs from the case now before the Court, which arose within the jurisdiction of the Republic of Panama.

We respectfully submit that no rule or decision of Colombia or Panama can be found throughout the entire history of the Isthmus of Panama authorizing a recovery of damages for physical pain and suffering; and the rules and decisions in force on the Isthmus of

Panama on the 26th day of February, 1904, when the United States took over the Canal Zone, limited the recovery of damages in cases of personal injuries to the actual economic loss suffered; and no evidence has been introduced in this case to show that the rules or decisions in that respect have been modified in the Republic of Panama since February 26, 1904. Damages are allowed under the Civil Code by virtue of Articles 1613 and 1614 of the Civil Code of Panama and the Canal Zone. Article 1613 of the code reads as follows:

> "The indemnity for damages comprises the emergent damage and the ceasing income, whether arising from the nonperformance of the obligation or its imperfect performance, or through delay in performance.
>
> "Such cases are excepted in which the law expressly limits the indemnity to the emergent damage."

Article 1614 reads as follows:

> "By 'emergent damage' is understood the damage or loss arising from the nonperformance of the obligation or from its imperfect performance, or delay in its performance; and by 'ceasing income' the profit or benefit which ceases to be received as a consequence of the nonperformance of the obligation, its imperfect performance, or delay in its performance."

Civil damages have been allowed in the courts of Panama for personal injuries in criminal cases, in addition to the penalty imposed for the offenses committed against the injured party. Therefore, we are justified in looking to the penal laws of Colombia and Panama to ascertain the measure of damages in cases involving personal injury.

Dr. Fernando Velez, the leading Colombian commentator on the Civil Code, in discussing the question of damages recoverable in civil actions for personal in-

juries under Articles 1613 and 1614 of the Civil Code, quotes with approval the language of Señor Vera, the Chilean commentator on the Civil Code, as follows:

> "If the act committed is an offense prescribed and punished by penal law, the obligation which arises from it not only includes the indemnity or payment of the damage caused, but also carries with it as a precise and necessary consequence the burden of the penalty imposed by law. Thus, for example, if the offense is a homicide, the delinquent is obliged to pay all of the expenses incurred in the assistance rendered the deceased; his funeral expenses, and what may be necessary for the subsistence of his wife and children of the deceased, the judge trying the case being the one who will regulate these indemnities and the manner of satisfying them. If the crime is one of wounds or of physical offenses, the indemnity shall consist of the payment of all costs of the cure and convalescence of the injured party and of all of the profits that he may have lost up to the time of the complete restoration of his health." (Estudio sobre El Derecho Civil Colombiano, por Fernando Velez, Vol. IX, pp. 13 and 14.)

The quotation from Señor Vera makes clear the meaning of "emergent damages and ceasing income," as defined by Article 1614 of the Civil Code. It will be seen that in case of a physical injury the offended party is entitled to be reimbursed for the cost of his cure and convalescence, in other words, for the damage emergent; and also for the profits that he may have lost up to the time of his complete restoration to health, that is to say, for the ceasing income.

If we go back to the old Criminal Code of the State of Panama we find that under the provisions of Article 76 of that code, one who suffers physical injury at the hands of another may recover from the latter the cost

of his cure and subsistence for himself and family. (Page 76 of the record.)

The Colombian Civil Code is an adaptation of the Chilean Code. Economic damages only are recoverable under the Chilean Code, as is manifest by Article 2331 of that Code, which reads as follows:

> "Slanderous imputations against the honor or credit of a person do not give a right to a cause of action for pecuniary indemnity, unless emergent damages or ceasing income, capable of appreciation in money, is proven; but not even then shall the pecuniary indemnity be recovered if the truth of the imputation is proven."

If we trace the doctrine of damages back to the laws of Spain, we find that the same rule applies. The Supreme Court of Spain, in a decision rendered on December 6, 1882, in a case of criminal slander said:

> " * * * * Inasmuch as the value of honor is a thing that can not be appraised, it is not possible to fix the amount of damages, nor can the payment of an indemnity be imposed upon the offender under Article 18 of the code, by way of civil liability arising out of the criminal act."

We would also refer the court to the case of Marcello *vs.* Velasco, reported in 11 Philippine Reports, page 287, where the doctrine of the Spanish law is fully discussed.

The same question came up in the case of Orozco *vs.* The Panama Electric Company, which was decided by the Supreme Court of Justice of Panama on October 5, 1918, and it was there held that moral damages could not be recovered. The Court, in disposing of the issue, used the following language:

> "In the complaint nothing is said of injuries on account of moral damages, and in none of the material allegations of the action are moral damages considered. If the plaintiff had desired to

submit that question she should have done so in due form, that is to say, state clearly in what amount she estimated the damages for the material injury and in what amount the moral injury.

"However, as the attorney for the plaintiff in his argument upon the second instance has insisted upon reparation for the moral damage suffered by the plaintiff, the court has examined the point, and has reached the conclusion that neither the legislation in force up to the 30th of September, 1917, nor that in force at the present time, authorizes the inclusion of the moral damage in the appraisal of the injuries, and also that there is no existing jurisprudence, establishing such a doctrine in the Tribunals of Colombia, nor in those of Spain from whence the civil and penal codes now in force were derived."

The Superior Tribunal of the Department of Cundinamarca, in which the city of Bogota, Republic of Colombia, is situated, had occasion, as late as May 23, 1918, to pass on the question of damages here presented. The facts of the case were as follows: The plaintiff, Leon F. Villaveces, had purchased a vault in the cemetery of the city of Bogota, where the remains of his wife were deposited. The municipality leased some of the vaults, and sold others. The employees of the municipality, laboring under the mistake that the plaintiff had leased the vault in question and had failed to pay the rent, whereas he had purchased it outright, removed the remains of his wife, and deposited them along with those of other persons in the common bone heap of the cemetery. [The practice prevails in many Latin American countries of taking out the remains from leased vaults, in default of the payment of rent, and putting the remains in a common bone pile in the cemetery grounds. Translator's note.] The coffin

was destroyed and the marble slab was lost. He brought suit for trespass upon the vault, which was his property in fee, and for the loss of the coffin and the slab, and in addition, he sought damages for his mental anguish suffered on account of the indignity to the remains of his wife. He recovered damages for the trespass upon the vault and for rents and profits. No damages were allowed for his mental anguish. In discussing the issue, the Court said: [The translation is ours.]

> "It having been proved in the present case that the removal of the remains of Señora de Villaveces was effected by the employees of the municipality of Bogota, this entity is responsible for the fault of those employees, provided it is proven that the act alleged caused damage to the plaintiff, appreciable in money.
>
> "The fault is not contractual, emanating from the contract of sale of the vault, because the vault, and not the remains, constituted the thing sold by the municipality. The fault springs simply from the act of the removal of the remains, but without intention to cause damage. This intention has not been proven, nor was there any pretense at establishing it. The fault is extra-contractual or aquilian.
>
> "In order that indemnification may be allowed for this kind of fault, it is necessary, in conformity with Article 2341 already cited, and Article 2356 of the Civil Code, that the Act has caused damage, and that this be proven.
>
> "But what kind of damage is it that is comprised in this provision? 'All damages that may be imputed to want of care or malice of any person' says the article. Therefore, it may be concluded that the material damage, or damage to the patrimony, as well as damage purely moral, is comprised therein. Laurent, (Vol. XX, No. 395) and Georgi (Treatise on obligations, Vol. 5, No. 161, *et seq.*) say that the French and Italian doctrine, as well as the jurisprudence of those

countries, in the light of their tradition, recognize the fact that indemnification includes not only the material damage, but the moral as well, because both should have some sanction; but the second author adds (page 252) that by the term 'moral damages' recoverable within the meaning of the dominant theory, physical pain and mental anguish are not included, except to the extent to which they may reflect upon the patrimony; because, he also says that the offense done affects that which is possessed or may be possessed, and it is in this limited sense that they allow a recovery. In one case only, he says, 'our legislation admits a recovery of moral damages, independently of all patrimonial consideration, and that is in the case of a crime that offends the honor of the person or family, which permits reparations not made in Civil matters, and is based on Article 38 of the penal code. In every other case the influence on the patrimony is indispensible. And further, on page 363, in treating of the liquidation of damages, he expresses himself thus: 'The Judge should have in mind the fact that the damages recoverable are those resulting directly or immediately from the evil or the fault; and he should remember that the moral damages are recoverable insofar as they reflect on the patrimony; because in nine times out of ten the loss of honor, of tranquility, of health, and so on, successively, will impede the economic and future well being which the victim, on account of the offense, has lost irrevocably.'

"And on the other hand, on page 162 of the same work, the same author says that he who demands indemnification for injuries must prove the generic wrong, that is to say, an act from which there can not be excluded the idea that this has caused damage, although it does not furnish the specific proof of the damage, that is to say, its amount. This principle is the one resulting

from Article 2341 of the Civil Code, when it says: 'He who has caused damage to another is obliged to indemnify.'

"Therefore, if it were admitted that in the Colombian legislation damages purely moral may be recovered, it is necessary to prove that the act has caused damage, reflecting upon the patrimony of the plaintiff, that is to say, that in consequence of the act there has been caused to the party asking reparation a depreciation in his patrimony, although at the moment of recognizing the damage this has not been determined.

"Now, therefore, may it be said, in the present case, solely with the proof of the fact that the remains have been removed by employees of the municipality, that there has been caused damage to the plaintiff, which the municipality is bound to repair.

"The court, after a careful study of the matter, has arrived at a negative conclusion, because the plaintiff, Señor Villaveces, has not furnished even the generic proof of the wrong reflecting on his patrimony; and this proof should be furnished before the sentence that recognizes the indemnity, because, in conformity with Article 740 of the Judicial Code, the judgment should contain the basis for the determination of the indemnification in another suit, in which the amount of the damage alone is to be resolved. In that suit the obligation itself to repair is not discussed. The plaintiff has not proven any pecuniary expenses incurred by him in any form to have the remains of his wife returned to him; nor the intranquility which he may have experienced in consequence of the removal of the remains.

"The plaintiff, for example, says that he is disposed to spend a large sum in order to recover the remains in question. Now, if he had proved that he had made the expenditure, that fact would serve as a basis for the recognition of his

right to damages; but the sole fact of the plaintiff's offer to expend a sum of money in the recovery of the remains of his wife, never can serve as a basis upon which to award damages, because the sentence can not recognize damages except those incurred anterior to the complaint. The same thing occurs with respect to the intranquility or sorrow caused by the removal of the remains. If that sorrow impaired the health of the plaintiff, and he expended money to recover his health, he should establish the fact of those expenditures made prior to the suit.

"Finally, the indemnity for damages caused by the act indicated as the foundation of the wrong, comprises all indemnity of emergent damage and the ceasing income, except in the cases in which the law limits the recovery to emergent damage. (Article 1613, Civil Code.) In consequence, every individual who asks that he be indemnified for damages should establish what he has lost by the act that caused the damage, and what he has ceased to earn by reason of the same." (Leon F. Villaveces *vs.* The Municipality of Bogota, Sentence of the Superior Court of Cundinamarca, Republic of Colombia, dated May 23, 1918.)

In conclusion we desire to refer to the ruling of the Circuit Court of Appeals in this case, which we respectfully submit did not correctly announce the Panaman rule of decision.

The Court quotes in full, from the amended complaint, Article 2341 of the Civil Code of Panama, Article 5 of Law 62, approved April 24, 1887, and Articles 488 and 489 of the Police Code of Panama. We wish to add here that the Police Code of Panama was enacted by the Assembly of the Department of Panama in 1896, and was limited and is now limited in its application to the territory of Panama, and at no time did it extend over

any other part of Colombia. After quoting the above-mentioned laws, the Court of Civil Appeals said:

> "There was evidence to prove that the plaintiff was injured as alleged. The existence of the quoted laws of Panama was not denied by the defendant, but it was contended in its behalf that a request for a directed verdict in its favor should have been given, on the ground that neither of those laws, as it was authoritatively interpreted and enforced in Panama, had the effect of making a railroad company answerable for the negligence or misconduct of its employees while acting within the scope of their employment, and that the doctrine of *respondeat superior* is not a part of the law of Panama. We are not of the opinion that the evidence which was adduced as to the laws of Panama supports this contention. On the contrary, we think the evidence is such that it well supports a finding that the quoted statute of 1887, as it has been authoritatively interpreted in Colombia while Panama was a part of that country, has the effect of making railroad companies responsible for personal injuries caused by the want of care or negligence of their employees while engaged in the service they were employed to render."

We interposed a general denial of the allegations, general and special, of the amended complaint; and, in addition, the answer contained a specific denial that the defendant in error could recover under the law of Panama. (Pages 47 and 48 of the record.) The issue was fairly raised, which required the defendant in error to prove that a recovery could be had in the courts of Panama, upon the facts set out in the amended complaint. (Cuba *vs.* Crosby, 222 U. S., page 473.)

The fact that a special denial followed the general denial, wherein the plaintiff in error stated that under the laws specifically set out in the amended complaint and the rules and decisions of the courts of Panama and

Colombia the defendant in error could not recover, was not such an admission as would relieve the defendant in error from proving his case.

The ruling of the Court of Appeals is objectionable because it overlooks the decisions of the courts of Panama and Colombia, rendered prior to February 26, 1904, and decisions of the courts of Colombia rendered subsequent to the enactment of Article 5 of Law 62 of 1887, but prior to February 26, 1904, when the United States took over the Canal Zone. The case of Felipe Ramirez, Isidoro Burgos, his attorney, *versus* The Panama Railroad Company, was decided by the Court of Panama in January 26, 1886. (See pages 9 to 29 of the record for a full translation of the record). In that case it was held that the Panama Railroad was not responsible for the criminal acts of its employees.

The case of Ruperto Restrepo *vs.* The Sabana Railway Company (La Compania del Ferrocarril de la Sabana) was decided by the Supreme Court of Colombia on July 19, 1892, five years after the enactment of Article 5 of Law 62 of 1887. The court expressly held that a corporation could not be held liable for the penal acts of its employees. These two cases were specifically cited in our special denial, and they were within the judicial knowledge of the court, and it was not necessary for us to submit them in proof.

It may be said that the laws set out in the amended complaint were within the judicial knowledge of the court. This we concede, but we submit that they should have been construed in conformity with the decisions of the courts of Panama, because the cause of action accrued in the Republic of Panama. We would add that the Court of Appeals made no reference to articles 488 and 489 of the Police Code of Panama which limit the liability of the conductor, and the adminstrator of the company subsidiarily.

We assume that the Court of Appeals had in mind the case of Cancino *vs.* The Railroad of the North, decided on December 16, 1897, by the Supreme Court of Colombia, when it stated that the quoted statute of 1887 as it had been authoritatively interpreted in Colombia while Panama was part of that country, "has the effect of making railroad companies responsible for personal injuries caused by the want of care or negligence of their employees while engaged in the service they were employed to render." (The Cancino case is set out in a full English translation in our brief in the Bosse case, already decided by this Court.) The Cancino case was not for personal injuries but for damage to property. Conceding that the principles announced in the case would be applicable in a suit for personal injuries, yet the decision does not sustain the ruling of the Court of Appeals. The Colombian Court had already held in another case that a corporation was not liable for the penal acts of its employees. The Cancino case in no manner militates against the provision of Article 2347 of the Civil Code, which says that the responsibility of the empresario shall cease if it is shown that he could not prevent the act by the exercise of due care and authority. As a matter of fact the charge of negligence was brought home to the empresario himself. The facts were as follows:

It appears that the railroad company's management had been advised of the burning of other houses along the line of the railroad, prior to the burning of the house in question. Notwithstanding this information, the empresario neglected to provide his engine with spark arresters or take other measures to prevent the burning of houses by sparks from the engines. The court laid stress on the fact that the house in question was built prior to the construction of the railroad, and that it had a thatch roof like the other houses and that had been

previously burned. In other words, the empresario, General Davila, found the situation that needed attention when the road was built, and he took no precaution to prevent fires, and continued to be negligent after he had been advised of the burning of the houses along the right-of-way, and it was these facts that caused the Supreme Court of Bogota to affirm the judgment against General Davila.

In respect to the question of damage, the Court of Appeals said:

> "Under the law in force in Panama and in the Canal Zone, damages for physical pain and suffering are recoverable in such an action as the instant one. Panama R. R. Co. *vs.* Bosse, 239 Fed. 303."

The decision in the Bosse case was based on common law principles, and not upon Panaman law as interpreted by the Panaman courts. The Court of Appeals disposed of the question of damages in the Bosse case in the following paragraph:

> "Under the jurisprudence of the Canal Zone, and we think a proper interpretation of Articles 2341 and 2356 damages for physical pain and suffering are recoverable."

The jurisprudence of the Canal Zone in the matter of damages rests upon the rule of decision of the courts of the United States and not those of Panama. (Fitzpatrick *vs.* Panama Railroad Company, Vol. 2, page 111, Canal Zone Supreme Court reports). The Panaman jurisprudence was rejected by the trial court in the Bosse case, and the action of the lower court was sustained by this Court, as well as by the Court of Appeals.

We are now dealing with a cause of action which arose in Panama, and we submit that our general and special denial put the burden upon the defendant in error to

prove that damages for physical pain were recoverable under the laws and decisions of that country. This he failed to do. And we submit that under the laws and authoritative decisions of Panama, within the judicial knowledge of this Court, such damages are not recoverable.

The premises considered, we ask respectfully that the judgment in this case be reversed and that this Court render a judgment for the plaintiff in error.

Respectfully,

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Panama Railroad,
Plaintiff in Error.

O

CONTENTS

	Page.
Table of Contents	i
Index of Authorities Cited	iii-iiii
Statement of Defendant in Error	5
Reply to Preliminary Statement of Plaintiff in Error	10
Reply to First Assignment of Error	13
Reply to Second Assignment of Error	21
Reply to Third Assignment of Error	24
Reply to Fourth Assignment of Error	25
Statement of Evidence upon which the Charge of the Trial Court was based	25-28
Reply to Fifth Assignment of Error	32
Pain and Suffering as Elements of Damage	
(a) At the Civil Law	33-40
(b) By the Law of the Forum	41-43
Conclusion	43

INDEX OF AUTHORITIES CITED.

	Referred to at Page
Borrero v. Cia. Anon. de Luz Elect. de Ponce, 1 Porto Rico Fed. Rep., 144	39
Brief of Plaintiff in Error in this Court in Panama R.R. Co. v. Bosse, No.522 , Oct. Term, 1918	7–11–14–15–16
Cancino vs. R.R. of the North, Jud. Gazette of Colombia, Year XIII., Nos. 652-653	14–15–16
Civil Code of Louisiana, Art. 2315 (2294)	37
Civil Code of Canal Zone, Arts. 2341, 2347 and 2349	17
Civil Code of Panama, Arts. 1613, 1614, 2341, 2347, 2349	34
Civil Code of Porto Rico, Art. 1803	39
Concha, Tratado de Derecho Penal, (Treatise on Colombian Criminal Law, pages 114-116	19–21–35
Cuba vs. Crosby, 222 U.S., 473	8
38 Cyc., 551	41
Davis v. Mills, 194 U.S., 451, 48 L.Ed. 1097	42
Egbert vs. N. O. Ry. and Light Co., 128 La. 474	38
Guzman v. Herencia, 4 Porto Rico Fed. Rep. 105, s.c. 55 L. Fd. U.S.), 81	40
Hanna v. N. O. Ry. and Light Co., 126 La. 634	38
Hubgh v. N. O. and C. R. R. Co., 6 La. Ann., 495	37
Jurisprudencia Colombiana, page 561, Art. 356	18–19
L. and N. R. Co., v. Daugherty, 32 Ky. L. Rep., 1392, 15, L.R.A. (N.S.) 740	30
Lee v. Powell Bros. and Sanders Co., 126 La. 51	38
Martinez v. Am. Ry. Co., 5 Porto Rico Fed. Rep. 311	40
Neff v. Cameron, 18 L.R.A., 320	30
Panama Elect. Ry. Co. v. Moyers, 249 Fed. 19	12
Panama R.R. Co. vs. Beckford, 231 Fed. 436	33

Panama R.R. Co. vs. Bosse, 239 Fed. 303 34
Panama R.R.Co. v. Bosse 249 U.S. 41 16–17–18
Panama R.R. Co. v. Curran, 256 Fed. 768 34
Panama R.R. Co. v. Piggot, 256 Fed. 837 34
Panama R.R. Co. v. Roberts, 256 Fed. 773 34
Panama R.R. Co. v. Toppin, 250 Fed. 989 34
Ramirez v. Panama R.R. Co., Jud. Gazette, Colombia, Year I. No. 170 36
Rowell vs. West. U. Tel Co., 75 Tex. 26, 12 S.W. 534 ... 35
Rush v. French, 1 Ariz. 99, 122, 123; 25 Pac. 816 22–23
Slater v. Mex. Nat. Ry. Co., 194 U.S. 120 10–42
Thomas v.s St. L. I. M. R. Co., 173 S.W. (Mo. App.) 728, 9 N.C.C.A., 92 (1915) 30
Villaveces v. Bogota, Brief of Plaintiff in Error, 36 35
West U. Tel. Co. vs. Hollingsworth, 11 L.R.A. (N.S.) 497, Reference to Notes 35
Wigmore on Evidence, Vol. 1, pages 57 and 60 23
Wood vs. Valdez, 4 Porto Rico Fed. Rep., 165 10

Supreme Court
of the United States

No. 147

PANAMA RAILROAD COMPANY,
Plaintiff in Error,

versus

JOSEPH T. TOPPIN.
Defendant in Error.

In Error to the United States Circuit Court of Appeals
For the Fifth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

DEFENDANT IN ERROR'S RE-STATEMENT OF THE CASE.

This is a Writ of Error to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming a judgment of the District Court for the Canal Zone in favor of the Defendant in Error.

The action was brought for personal injuries suffered by Defendant in Error at the hands of employees of Plaintiff in Error, in the City of Colon, Republic of Panama. Plaintiff in Error is an American Corporation, incorporated under the laws of the State of New

York, U.S.A., (Transcript of Record, pages 43 and 47) and Defendant in Error is a subject of Great Britain, being a native of Barbados, B.W.I., (Transcript of Record, page 86.)

Defendant in Error pleaded certain laws of the Republic of Panama, as giving him his right of action. (Transcript of Record, page 45.) Plaintiff in Error, in his answer, also pleaded certain portions of the Civil Code of Panama and of the Police Code, (Transcript of Record pages 7, 8 and 9), and in his answer to the Amended Complaint, tacitly admitted the existence of these laws as pleaded by the Defendant in Error. (Transcript of Record, page 48.) All of the statute laws pleaded by both parties, were in force in Panama and in the Canal Zone on and before date of February 26, 1904, and were continued in force upon the Canal Zone by Executive Order of the President of the United States, of March 8, 1904, which provided that "The laws of the land, with which the inhabitants are familiar and which were in force on February 26, 1904, will continue in force in the Canal Zone. . .until altered or annuled by the said commission." (See Panama Railroad Co. vs. Bosse, 249 U.S., 41.)

Although by inadvertance such fact fails to appear in the record, at the commencement of the trial in the District Court, Plaintiff in Error admitted in open Court that the statute laws as pleaded were the laws of the Republic of Panama, and waived proof thereof. The same admission and waiver were made by Defendant in Error as to the statute laws pleaded by the Plaintiff in Error.

In his brief in this case, in the Circuit Court of Appeals, Plaintiff in Error not only admitted the existence of such laws in Panama, but, at pages 20 and 21 there-

of, he also quoted in full Law 62 of April 24, 1887, (from which Defendant in Error has pleaded Article 5, and gave to that Court a history of the enactment of that law. He did the same at pages 45 and 46 of his Brief for Plaintiff in Error in the Case of Panama Railroad Company vs. Bosse, (No. 522, October Term, 1918), to which brief Plaintiff in Error is constantly referring in his brief in the instant case, and practically makes the Bosse brief a part of his present brief. (See pages 24, 25 and 43 of Brief of Plaintiff in Error.) In his present brief, Plaintiff in Error also refers to Art. 5, of law 62 of 1887, and practically admits it to be the law. (See page 42, Brief of P. in E.) See also opinion of Circuit Court of Appeals, at page 158 of Transcript of Record.

We dwell upon these may admissions of Plaintiff in Error as to the law of Panama because at page 41 of his present brief he states as follows:

> "We interposed a general denial of the allegagations, general and special, of the amended complaint; and, in addition, the answer contained a specific denial that the defendant in error could recover under the law of Panama. (Pages 47 and 48 of the Record.) The issue was fairly raised, which required the Defendant in Error to prove that a recovery could be had in the Courts of Panama, upon the facts set out in the amended complaint. Cuba vs. Crosby, 222 U.S. page 473.)"

For the reason that he had admitted the laws of Panama, and even urged them before the District Court for the Canal Zone and the Circuit Court of Appeals, Plaintiff in Error has at no time in this cause assigned as Error the fact that the Record does not

disclose affirmative proof of the laws pleaded by Defendant in Error, and now, for the first time, and without assigning such error, Plaintiff in Error seems to suggest that the failure to introduce specific proof of those laws constituted reversible error, and calls the attention of this Court to the case of Cuba R.R. Co. vs. Crosby, 222 U. S. 473.

But even if the parties in the Court below had not mutually agreed and stipulated that the statute law as pleaded in the various pleadings of both parties, was, as a fact, the statute law of the *loci delicti*, still we do not think that under the doctrine of Cuba v. Crosby, (*supra*), any error would have been committed had the District Court for the Canal Zone presumed the law of Panama to be so, because in that case, Mr. Justice Holmes, speaking for this Court, says:

> "Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common-law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state."
>
> Cuba R.R. Co. v. Crosby, 222 U.S. 473: 56 L. Ed. 274, l.c. 276.

Eo converso, as between two *Civil Law* countries, each governed by the Code Napoleon, the Civil Code of one may reasonably be presumed to be what it is decided to be in the other, in a case tried in the latter state.

We believe that the instant case, i.e., a case tried in the Canal Zone upon a cause of action arising in Pana-

ma, is clearly within the limitation indicated in the above-quoted decision, because the very law and Codes of Panama were made, by Executive Order, the laws and Codes of the Canal Zone, and the District Court for the Canal Zone must, perforce, take judicial cognizance of the fact the the present Civil Code of the Canal Zone, the Police Code, and law 62 of 1887, except in so far as said codes and laws have been amended in the Canal Zone since their adoption, were the laws of Panama on date of February 26, 1904, and may be presumed to still be the law of Panama until the contrary is shown.

We do not consider, however, that Plaintiff in Error is serious in raising this point, because in the final paragraph at page 42 of his present brief he says:

> "It may be said that the laws set out in the amended complaint were within the judicial knowledge of the court. *This we concede*, but we submit that they should have been construed in conformity with the decisions of the courts of Panama, because the cause of action accrued in the Republic of Panama." (Italics are ours.)

The salient points of the contention of Plaintiff in Error are:

First:—That the District Court and the Circuit Court of Appeals committed error in applying the doctrine of *respondeat superior* to the case at bar: and,

Second:—That said courts erred in allowing an instruction as to physical pain and suffering as elements of damage, to go to the jury.

These two points, as we understand the brief and written argument of Plaintiff in Error, constitute his

defense; and as to these, Defendant in Error contends the no error was committed.

REPLY TO PRELIMINARY STATEMENT OF PLAINTIFF IN ERROR.

We admit that this action arose under the laws of Panama, and that the laws of Panama give the right of action to Plaintiff to recover: nor do we question the correctness of the doctrine of Slater vs. Mex. Nat. R.R. Co., 194 U.S. 120, quoted at page 8 of brief of Plaintiff in Error. In the case at bar, however, Plaintiff in Error was unable to show to the District Court, or to convince the Circuit Court of Appeals, that the laws of the Republic of Panama provide any limitations upon his liability of which he has been deprived the benefit.

> "On the contrary, we think the evidence is such that it well supports a finding that the quoted statute of 1887 as it has been authoritatively interpreted in Colombia while Panama was a part of that country, has the effect of making railroad companies responsible for personal injuries caused by the want of care or negligence of their employees while engaged in the service which they are employed to render."
>
> Opinion of C.C. A., Transcript of Record, page 158.

In arriving at this finding the Circuit Court of Appeals had before it the case of Cancinco vs. The Railroad of the North, decided by the Supreme Court of Colombia, at Bogota, on December 16, 1897, (See brief of Plaintiff in Error, page 43), which case was presented to the Circuit Court of Appeals in the brief of the Plaintiff in Error, below, and which case was also presented to this Court by the Plaintiff in Error, in the case of

Panama Railroad Company vs. Theo. Bosse, 249 U.S., 41, decided March 3, 1919. Plaintiff in Error here again calls the attention of this Court to the Cancino case at page 43 of his present brief, by reference to his brief in the case of Panama Railroad Company v. Bosse, *supra*.

If the contention of Plaintiff in Error is sound, and we think it is in this regard, that the District Court for the Canal Zone will take judicial notice of the laws of Panama as they existed in the territory which is now the Canal Zone, on date of February 26, 1904, (See brief of Plaintiff in Error, pages 10 and 11), then the District Court for the Canal Zone was bound to know the interpretation of Art. 5 of Law 62 of 1887, made by the Supreme Court of Colombia in the case of Cancino vs. Railroad of the North, (*Supra*).

Plaintiff in Error, at pages 8 and 9 of his brief, advances the doctrine that on the grounds of saving expense to the United States, the various American corporations who are allowed to do business upon the Canal Zone and under protection of American laws and who have the District Court for the Canal Zone for the enforcement and protection of their legal rights, should not be sued in that Court if the cause of action arises outside of the territorial limits of the Canal Zone; and in support of that theory he quotes from a small part of the opinion of the C.C.A. for the 5th Circuit, in Panama Electric Co. v. Moyers, 249 Fed. 19. We beg likewise to call the Court's attention to the same case.

It appears from the opinion of the Circuit Court of Appeals, that the Record shows that the Plaintiff was a non-resident of the Canal Zone, and no allegation was made as to the citizenship of either Plaintiff or De-

fendant. The tort giving rise to the action was committed in Panama, the domicile of both parties. Defendant was however, doing business and had some property within the Canal Zone. The Circuit Court of Appeals, with all of these facts in view, said:

> "There are many excellent reasons why the Courts of the Canal Zone should not take jurisdiction of cases arising in Panama, *especially where it is not shown that either party is a citizen of the United States.* The courts of Panama are easily accessible, and, it must be assumed, better qualified to determine and apply the laws of that country than are the Courts of the United States. *While this is true, the authorities seem to establish that the courts of the Canal Zone are not without jurisdiction of cases of the kind here involved.* The action is one known as transitory, and the rule appears to be that courts anywhere will entertain jurisdiction if service may be had upon the defendant. It is true that in most of the cases in which such jurisdiction has been exercised, one or both of the parties have been citizens of the country in which the suit is brought; but the law as stated in the cases would not seem to regard the matter of citizenship as controlling. Dennick v. Railroad Co., 103 U.S. 11, 26 L. Ed. 439; Railroad Co. vs. Crosby, 222 U.S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L.R.A. (N.S.). 40; Evey v. Mexican Central Ry. Co., 81 Fed 294, 26 C.C.A. 407, 38 L.R.A., 387; Slater v. Mexican Nat. Ry. Co., 194 US. 120, 24 Sup. Ct. 581, 48 L.Ed. 900, s.c. 115 Fed. 593, 53 C.C.A. 239; Stewart v. B. & O. R.R. Co., 168 U.S. 448, 18 Sup.Ct. 105, 42 L.Ed. 537." (Italics ours).
>
> Panama Electric Ry. Co. v. Moyers, 249 Fed. 19, 20.

In the case at bar the Defendant is a citizen of the United States. Its incorporation under the laws of the

State of New York was admitted by the pleading of Plaintiff in Error. (Transcript of Record, pages 43 and 48). It is notorious that all of its administrative and executive offices and officials are located within the Canal Zone: that the bulk of its business is transacted within the Canal Zone. In fact this Court may take judicial notice of the fact that the Panama Railroad Company is entirely owned by the United States and that it is operated by the United States as an adjunct to the operation and maintainance of the Panama Canal. The docket of the District Court for the Canal Zone is crowded with criminal cases where that court is called upon to punish those guilty of offenses against the property of the Panama Railroad Company. Only a few months ago the Panama Railroad Company instituted in that Court, (and the case is still pending) an action in tort against the United Fruit Company. We cannot subscribe to the doctrine that on the grounds of saving expense to the United States, the District Court for the Canal Zone should decline to entertain jurisdiction to hear those who have been seriously injured by the negligence of the Panama Railroad if the injuries happen to be received beyond the territorial limits of the Canal Zone.

REPLY TO FIRST ASSIGNMENT OF ERROR.

We take it that the only point raised in Argument and Brief of Plaintiff in Error upon this Assignment which merits consideration, is the statement made at page 14 of said Brief and Argument:

> "And in support of the first assignment of error we desire to add that under the laws and decisions of Panama and Colombia a civil suit cannot be

maintained against a corporation for the penal acts of its servants and employees."

Plaintiff in Error refers the court to the case of Ramirez vs. Panama Railroad Company, Judicial Gazette of Colombia, Year I, p. 170, Bogota, June 10, 1887, a translation of which appears at pages 9—28 of the Record.

We beg to call attention to the fact that it appears from said case that the same was decided in the Supreme Court at Bogota on January 28, 1886, and was an appeal from a judgment rendered on July 28th, 1885. (Transcript of Record, Page 10.) Even if the construction of the Colombian law in that case was correct and in support of Plaintiff in Error's contention, subsequent to that case, on April 24, 1886, the legislature of Colombia passed Law 62 of 1887, of which Art. 5 is pleaded in the Amended Complaint of Defendant in Error. (Transcript of Record, page 45.)

Subsequent to the passage of that act, the same Supreme Court decided the case of Cancino vs. Railroad of the North (Judicial Gazette of Colombia, Year XIII., Bogota, Aug. 16, 1899, Nos. 652—653 .)

This case was brought to the attention of the District Court for the Canal Zone by Plaintiff in Error in urging his demurrer; and in his brief in the Circuit Court of Appeals in this same cause, Plaintiff in Error at pages 31-34 inc. of said brief, invited the consideration of the Court to that case. In his present brief Plaintiff in Error again refers to the Cancino case at page 43 of his brief, calling attention to the fact that it is set out in full in the Bosse case, (Panama Railroad Co. vs. Bosse, No. 522, Oct. Term, 1918: (249 U.S., 41).

As Plaintiff in Error has repeatedly called the at-

tention of this Court to the Bosse brief, and as he has, together with his present brief, served Defendant in Error with copies of his brief in the Bosse case, it is evident that he incorporates the Bosse brief in his present brief; and while we do not feel called upon to answer everything which appears in the Bosse brief, yet we believe that we may with propriety, call the attention of this Court to certain extracts from the Cancino case which appear in the said brief filed for Plaintiff in Error in Panama Railroad Co. vs. Bosse.

> "The Tribunal in appying this disposition to the case of the suit, establishes the responsibility of the defendant as empresario of the Railroad of the North under whose authority the engineer of the locomotive which caused the fire was serving; and applying the rule contained in art. 1604 of the Civil Code that 'the proof of the diligence or care is enbumbent on him who ought to have exercised it,' the Tribunal deduces that the action having been directed not against the locomotive engineer of the railroad, but against the empresario, there is no necessity of ascertaining if there is a criminal responsibility on the part of the engineer, without for that reason pausing to consider if the civil action could have been instituted without regard to the criminal action even before the existence of law 169 of 1896—because it takes notice of the existence of law 62 of 1887, which reads as follows:
>
> 'The empresarios of railroads will be responsible for damages and injuries which they may cause to persons or property by reason of the services of said roads, and which may be imputable to carelessness, neglect, or violation of the police regulations which will be issued by the Government as soon as the present law is promulgated."

Page 137, brief of Plaintiff in Error, in Panama R.R. Co., v. Bosse, *supra.*

"Without questioning the correctness of this doctrine of the Tribunal, because the dependence or subordination of one man to another cannot be absolute but only relative, it is clear on the other hand that the provisions of art. 5 of law 62 of 1887, above-quoted, without in any way mentioning the dependents, employees or workmen of railway enterprises, makes their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the services of the said roads."

Id. page 138.

"What the legislator undoubtedly wished was to establish a special rule by virtue of which empresarios of railroads, (not the engineers or dependents) should respond for damages to persons or their property by reason of the service of the railroads themselves; a rule which has come to be complementary to that of article 2347 of the Civil Code."

Id. pages 142, 143.

As this Court had both Art. 5 of law 62 of 1887, and the case of Cancino vs. Railroad of the North, (above quoted from), before it, on brief of Plaintiff in Error, in considering the case of Panama Railroad Co. vs. Bosse, (*supra*) it was undoubtedly to Art. 5 of law 62 of 1887 that the Court referred when it said, through Mr. Justice Holmes:

"As we do not rely for our conclusion upon a Colombian act specially concerning the empresarios of railroads....."

Panama R.R. Co. v. Bosse, 249 U.S. 41.

Although in the instant case the Plaintiff in Error cannot, as was attempted in the Bosse case, (*supra*),

set up the defense of *ultra vires* to escape responsibility under that act, this Court is not here, any more than it was in the Bosse case (*supra*), required to rely for its conclusion solely upon the provisions of Art. 5 of Law 62 of 1887, but may, and undoubtedly will maintain its ruling as to the construction of Articles 2347 and 2349 of the Civil Code of Panama, pleaded by Plaintiff in Error in his answer in the District Court, (Transcript of Record, page 7), which articles were thus construed by this Court in the Bosse case, so often referred to:

> "By art. 2341, in the before-mentioned translation, 'he who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes' . . . By art. 2347, 'Every person is liable not only for his own acts for the purpose of the indemnity of damage, but also for the acts of those who may be under his care.' illustrating by the cases of father, tutor, husband,etc. By art. 2349, 'Masters shall be responsible for the damage caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to forsee or prevent by the employment of ordinary care and the compentent authority; in such case all responsibjlity for the damage shall fall upon said domestics or servants.' The qualification in this last article may be taken to refer to acts outside of the scope of the employment. It cannot refer to all torts, for that would empty the first part of meaning. A master must be taken to foresee that sooner or later a servant driving a motor will

be likely to have collision, which a jury may hold to have been due to his negligence, whatever care has been used in the employment of the man.

We are satisfied that it would be a sacrifice of substance to form if we should reverse the decision, the principle of which has been accepted by all the judges accustomed to deal with the locality, in deference to the possibility that a different interpretation might have been reached if the civil code had continued to regulate a native population and to be construed by native courts. It may be that they would not have distinguished between a negligent act done in the performance of the master's business and a malicious one in which the servant went outside of the scope of that for which he was employed. But we are by no means sure that they would not have decided as we decide. At all events we are of the opinion that the ruling was correct."

Panama R.R. Co. v. Theo. Bosse, (*supra.*)

If, indeed, any doubt exists in the mind of this court as to in what manner a native court would have construed the articles above cited, the following quotation from the Supreme Court of Colombia may be of assistance in arriving at an answer:

"In cases of torts and civil culpabilities, the jurisprudence finds itself perfectly in accord in making the employers responsible for the acts of their agents, still more when the former show poor judgment in the employment of their agents. A transportation company, for example, who has in its service employees who, by their negligence, maliciousness or carelessness caused damage to person or property, makes itself responsible for the faults of its employees, through not having taken the proper care in their selection, and in having employed persons who do not fulfil the required conditions for the proper discharge of their duties.

The force of these principles is greater, if possible, when treating of the acts of public employees with relation to the entity that appoints them." (Translation ours.)

Jurisprudencia Colombiana, page 561, art. 356, quoting, Sentence of Oct. 20, 1898, Sup. Ct. of Colombia, Judicial Gazette, Year XIV. No. 56, 2 Bogota.

That the Supreme Court of Colombia was here properly construing the rule of *respondeat superior*, as it exists at civil law, and that this court was absolutely correct in its deduction that article 2349 cannot refer to torts committed within the scope of the servants' employment, is shown by the following quotation from one of the best of the modern Colombian commentators:

"Masters and principals are responsible for the damage caused by their servants and agents within the scope of their employment. This responsibility is likewise founded in a legal presumption of blame, which does not consist in a lack of vigilance, but in having badly selected the servant or agent who occasioned the damage. This responsiblity is at the same time less extensive and more rigorous than that of parents, instructors and artisans. On the one hand, masters and principals are not responsible except for the acts done by their servants and agents while acting within the scope of their employment. For example, if the coachman who conducts the coach, through his imprudence or malice knocks down on his way, a passerby, the master is responsible because he proceded badly in employing an individual who does not possess the qualifications to properly fulfil his office of employment; but the master would not be responsible if the coachman, in a quarrel, should wound or kill another. On the other hand,

the responsibility of masters and principals is more extensive than that of parents, tutors and teachers; in the sense that, except in the case of the former, (*sic*) proof cannot be admitted that they have not been able to avert the tortious act. (Art. 2341, Civil Code.)

Innkeepers and hotel keepers are responsible for the theft and damage of the effects of the traveller, as well when the act is done by servant or employees of the establishment as when by strangers who go in and out from there. Only the robberies made with force major are not imputable to the innkeepers or proprietors."

J. V. Concha Tratado de Derecho Penal (Treatise on Criminal Law), page116, paragraph 145. (Published at Bogota, Colombia, 1897).

(Translation is ours.)

In writing the commentary from which the foregoing quotation is taken, the writer was treating with the subheading, Civil Responsibility for Crime.

We freely admit the truth of the statement made by Plaintiff in Error at pages 17 and 18 of his brief, that Articles 488 and 489 of the Police Code of Panama were laws in force in the territory which now is the Canal Zone, when the Treaty was made, and by Executive Order of March 8, 1904, which provides that "The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force on the Canal Zone.....," were continued in force on the Canal Zone, and that the District Court for the Canal Zone must, perforce, take judicial cognizance of the fact that this was the law of Panama on that date, and until the contrary be shown, may and must presume these laws to continue in force in Panama. But we would add, that the same rule applies to articles 2341, 2347 and 2349 of the Civil Code and

Art. 5 of Law 62, of 1887, all of which articles and laws are law for the Canal Zone because of their adoption from Panama, and, under the doctrine of Cuba vs. Crosby, (222 U.S. 473), the Courts of the Canal Zone may consider them to mean what they have been decided to mean in the Canal Zone. This is especially more true when it appears that the views of the Colbombian courts and comentators are not at variance with the decisions of the Courts of the Canal Zone.

Under these laws, both as they have been interpreted and construed in Colombia and the Canal Zone, the Defendant in Error, in the instant case, has a good right of action against the Plaintiff in Error, the empresario of the railroad, for damage which he received in his person by reason of the service of the railroad and which damage was imputable to neglect, want of care or violation of the regulations of the Police Code, and there-was no error, in this regard, in overruling the demurrer.

REPLY TO SECOND ASSIGNMENT OF ERROR.

Plaintiff in Error assigns as error the action of the Circuit Court of Appeals in affirming the trial court in denying Plaintiff in Error's motion for a directed verdict. The record merely shows in this regard:

> "Defendant, through its counsel, then moved the Court that the Jury be instructed to bring in a verdict for the defendant, which motion was overruled, and to which ruling defendant, through its counsel, then and there excepted in open court'.
>
> Transcript of Record, page 131.

No specification was made by the defendant (Plaintiff in Error here), as to the grounds upon which said motion was based, nor does Plaintiff in Error, even at

this time, show upon what law or for what reasons his motion should have been sustained. The record does not show that Plaintiff in Error, based his motion, as he here attempts (Brief of Plainpages 18 and 19) upon any theory that the evidence showed contributory negligence on the part of Defendant in Error. In this connection we believe the statements made by Dunne, C.J., in an early Arizona case, to be a propos:

> "The Supreme Court in examining a question as to whether a ruling in a court below on an objection to evidence was correct or not, will not consider any other objection to the evidence than those urged in the court below. This rule is of universal adoption in the courts of this country.... Counsel are held to the grounds of objection stated at the time they call for a decision of the judge below, because they are supposed to know the law of their case, and if they do not offer other objections they are supposed to waive them, and the evidence admitted without valid objection should stand.....It is their business to be attentive on a trial, and if they miss a point by neglect they must lose it. Neither can we allow them to strike between wind and water on the trial, and then go home to their books and study out other objections and urge them here. They must stand or fall upon the case they made below, for this court is not a forum to discss new points of this character, but simply a court of review to determine whether the rulings of the court below on the case as presented were correct or not."
>
> Rush v. French, 1 Ariz. 99, 122, 25 Pac. 816.

> "A party wishing the benefit of the remedy must, at the time he complains, show how he is hurt; in the language of the old authorities, he must lay his finger upon the point of objection.....He must not merely complain in a general way, and

to say that to let certain evidence in will hurt his case, and that under the law it ought to be excluded and leave the judge and the opposite side in the dark as to what principle of law he relies on, and compel them to decide haphazard.....The opposing counsel can make no reply to a general objectionexcept to throw the whole responsiblity upon the judge at once, or else begin systematically and argue that under any possible objection the testimony should come in.....The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to chose his weapons, and the time and place to use them. Such things may do in love or war, when all things are said to be fair; but life is too short to transact business on such a system in Courts of justice."

Same case, page 123.

(These two quotations appear in Wigmore on Evidence, Vol. I., pages 57 and 60).

While the learned Arizona Chief Justice was, in the above decision, dealing with the question of objections to evidence, we believe that the general principle involved is the same when any objection to procedure is raised in the court below, and the counsel must show or point out to the trial court his grounds for objection or the grounds upon which his motion is made, and not, for the first time, disclose them in an appellate court as has been done in this instance.

Neither in his first answer, (Transcript of Record, pages 6 to 9), nor in his answer to the Amended Complaint, (Transcript of Record, pages 47 and 48), did Plaintiff in Error plead the defense of contributory negligence.

We believe that with the facts before the jury it was entirely within the province of the jury to find as to

whose fault occasioned the accident, and the Trial Court, with no more grounds urged than those urged upon the demurrer, could not rightly do otherwise than to overrule the motion.

At page 18 of brief for Plaintiff in Error, this Court is referred as to this assignment, to the arguments made in said brief upon the First Assignment of Error, and as we have already fully answered that assignment, we deem no further reply necessary.

REPLY TO THIRD ASSIGNMENT OF ERROR.

We think that our reply to the First Assignment of Error disposes of all the legal propositions advanced in the Third Assignment. In reply to the reference made at pages 25 and 26 of Plaintiff in Error's brief, to the testimony of S. W. Heald, Superintendent of the Panama Railroad, and of Martin B. Connolly, its Roadmaster, and the colored engineer (Moorfoot), as to the efficiency of the engineer who caused the accident, we would call attention to the testimony of witness Pellage, (Transcript of Record, pages 79 to 82), that the engineer was running at a high rate of speed, at a grade-crossing, not on the look-out, and paying no attention to danger or stop signals. This testimony was corroborated by witnesses Farrell, (Transcript of Record, page76) and Downes, (Transcript of Record, page 77.) If this testimony was true, (and the jury believed it to be true), then, under the doctrine of the case cited from Jurisprudencia Colombia at stet 18-19 of our brief, and the statement of the law of master and servant made by Dr. Concha in his commentary, quoted at page 19-20 of our brief, the Panama Railroad Company by having in its employ a man who would act in such negligent

manner, makes itself responsible for his acts, even under Colombian law, on account of having employed a man who does not possess the necessary qualifications for a proper discharge of his duty as a locomotive engineer.

There was no reversible error in the part of the Court's charge to which Plaintiff in Error excepts.

REPLY TO FOURTH ASSIGNMENT OF ERROR.

In consideration of that part of the charge of the Trial Court to which Plaintiff in Error excepts in his Fourth Assignment of Error, we beg to call the Court's attention to the evidence which was before the jury and concerning which the court was then charging:

The plaintiff below, Joseph T. Toppin, testified that the injuries which he received through the negligence of Plaintiff in Error, were caused by being struck by an engine and being thrown against a fire-hydrant, thus receiving severe bruises upon his left hip, back and shoulder. (Transript of Record, page 83). He stated that the bruises were so painful that he was confined in bed for about a week, then was able to sit in an easy chair until about two months after the accident when the pains in his hip increased, a stiffness set in in his leg and the leg became drawn up. He again took to bed where he was confined, growing steadily worse until December when he was taken to the hospital. (Transcript of Record, pages 84, 85, 91).

This evidence was not contradicted, and was supported by the testimony of witnesses Leacock and Phipps. (Transcript of Record, pages 130, 131).

Upon arriving at the hospital in December, he was so ill that he was unable to speak. He was takem to the hospital on a stretcher. (Transcript of Record, pages

91, 84, 129.) The diagnosis at the Colon hospital where he was first taken showed that he had developed a psoas abscess and a left scapular abscess and that left hip and lumbar region were very tender and painful. (Transcript of Record, page 114.)

He was sent to Ancon hospital for operation, and the records show that there he was operated upon for psoas abscesses and several smaller abscesses. (Transcript of Record, page 110).

From Ancon hospital he was transferred to Santo Tomas hospital where he was confined until February, 1915. When discharged from the hospital he went to his home in Colon, where he was laid up, unable to walk until September, 1915. (Transcript of Record, page 84.) None of these facts were controverted by Plaintiff in Error.

After this case was filed Toppin went to Ancon hospital to have X-Ray photos taken for use at the trial to show the condition of his spine at present. These plates were produced in evidence and the diagnosis was: "Possible T.B. fracture of the spine." (Transcript of Record, page 111.) "T.B.," as this Court is aware, is the usual medical abbreviation for "tuberculosis," or, "tubercular." These X-Ray plates were exhibited to the jury, and the medical expert, Dr. S. J. Taylor, called by both parties, and by order of the Court to testify, exhibited the plates to the jury and "explained the honey-combed condition of the bone, due to tubercular bacilli. (Transcript of Record, page 109.)

Dr. Taylor, by order of the Court, (Transcript of Record, page 52), made an examination of Toppin prior to the trial. He testified that he had made a skin test of Toppin, using Koch's Old Tuberculin and obtained

a reaction positive for tuberculosis. (Transcript of Record, page 95.) He found a swelling over the sacrum, the lower part of the back-bone, due, in his judgment, to tubercular bacilli. (Transcript of Record, page 96.) He thinks undoubtedly, that there is a tubercular condition growing there. It might be opened and treated, but on account of the big nerves at that point he does not know if the operation would be successful. It is hard to say whether or not Toppin is now unfit for work. He might work if he could sit down a great deal. It is hard to say just how much bone damage has been done. (Transcript of Record, page 107.) He thinks it probable that in time Toppin will have to undergo another operation. (Transcript of Record, page 108.) If Toppin could get the best of food and go to a good climate he might outgrow the trouble. (Id, 108). The doctor also said in answer to a question as to whether he would consider Toppin a cripple:

> "Why, after damage is done to a bone it is pretty hard to ever have it repaired. Of course, you may cure the condition. but the deformity will always be there. Like, for instance, a hunchback. Most of them are tubucular, and maybe you will see one where some bone has been destroyed. Possibly, the process is not active any more, but the bone doubles back and leaves him a hunchback. To that extent he is cured, but the deformity is there."
>
> (Transcript of Record, page 109.)

Asked as to whether Toppin's life had been shortened on account of his condition, the doctor said, among other things:

> "If he don't die of tuberculosis, that is a hard question."

"Most people consider that when they get tuberculosis they are pretty well finished."

"Of course, a good many people get well that never knew they had tuberculosis. I would not say that that would hold true if tuberculosis would attack the bone."

"As a rule bone tuberculosis is a local condition, if you can take it out altogether, a man has a chance to get rid of it and live his natural life with the deformity. As to what operation would be necessary to relieve Toppin's case, I would say you could open up the abscess and drain it, and you might take out some of the spinus process."

(Transcript of Record, page 109.)

Dr. Taylor also confirmed as authoritative, medical works on tuberculosis which were read to the jury, and which appear at pages 96 to 103, inc., of the Transcript of Record, showing that tuberculosis of the bone follows a slight injury.

He stated, (Page 96, Transcript of Record), that a psoas abscess is tubercular abscess. They are very slow in getting to where they need surgical interference. The patient will gradually bend forward. His leg will bend upward. These symptoms should develop in from six to eight weeks to three months, (Transcript of Record, pages 96, 105).

Besides hearing all of this evidence, and having read to them a number of medical works on the cause of bone tuberculosis, its symptoms and effect, the jury saw Toppin's condition for themselves, examined his scars and the present tubercular bone abscess which he has on his spine. (Transcript of Record, page84.)

In view of all this, we cannot understand Plaintiff in Error's contention that:

"The charge of the Court was erroneous in submitting to the jury the issue as to whether or not the defendant in error was permanently disabled."
(Brief of Plaintiff in Error, pages 31, 32.)

Prior to the accident of July 4, 1914, when Toppin was struck by Plaintiff in Error's locomotive, he was a strong, healthy young man. He had only been sick once before during his 13 years upon the Isthmus of Panama, and that was an attack of malaria in 1905. (Transcript of Record, page 85.) From the time of the accident, without any interruption or any other intervening cause, he is an invalid and a cripple. The connection is complete between the injury received on July 4, 1914, and his present condition. There was absolutely no evidence offered and none that could have been offered, that his present condition is due to any other cause. It was surely a question for the jury to decide as to whether his condition at present is the direct result of the injury received at the hands of the Plaintiff in Error, and upon such evidence the jury could do no more than find in the affirmative, which they did.

Nor was there any need of evidence to show whether Toppin had any tubercular germs in his system before the accident. Some authorities, as read at the trial, hold that the presence of tubercular germs in the system is a condition precedent to tuberculosis of the bone resulting from an injury. Others say it is not. (Transcript of Record, page 98.) We cannot see how the previous existence or non-existence of tubercular germs in Toppin's system could in any manner help out Plaintiff in Error's case. If they were previously there, and the injury caused them to become active and produce the present condition, and the injury alone was the cause

of the present activitity, then Plaintiff in Error is liable for the present condition.

> "The fact that a person is predisposed to tuberculosis or that his physical condition is such as to yield more readily to the germs of such disease, so that an injury caused by a sprained ankle is greater or different in degree than is usually to be expected from such a cause, will not relieve from liability the person whose negligence caused the injury."
>
> Thomas v. St. L. I. M. R. Co. 175 S. W., (Mo App.) 728: 9 N.C.C.A. 92, (1915).

> "If a person injured is feeble, sick or diseased, and the negligence or wrongful act aggravates the illness or disease, or produces conditions that would not ordinarily or reasonably have existed or occurred except for the negligence or wrongful act, and are directly attributable to it, the injured party may recover all the damages that flow from the negligence or wrongful act, including such as result from illness, sickness or disease aggravated by or that are produced by it, although the person inflicting the injury may not at the time know that the person injured is laboring under any infirmity, sickness or disability."
>
> L. & N. R. Co. v. Daugherty, 32 Ky. L. Rep. 1392: 15 L. R. A. (N.S.) 740.

And we cannot see why Plaintiff in Error calls the court's attention at page 31 of his brief to the case of Neff v. Cameron, 18 L.R.A. (N.S.) 320, as that case propounds the same theory:

> "A child having a latent tubercular tendency in its knees which is injured by a bruise thereon from a defective side walk may hold the municipality liable for any aggravation of such tendency which

is directly caused in natural and reasonable sequence by the bruise."

This case (the Neff case), is cited with approval in the Thomas case, *supra.*

These cases above cited show the true position of the law in this matter. But the trial court refused the request of the Defendant in Error to so charge the jury, and charged the jury to the contrary, committing error it is true, *but the error was in favor of the Plaintiff in Error.* And he cannot here complain of it.

Plaintiff in Error says at page 28 of his brief:

"The charge was objectionable because it authorized the jury to believe that the defendant in error had latent tuberculosis at the time of the alleged injury on the assumption that seventy-five or eighty-five per cent of the people have latent infirmities which might be developed as a result of an injury."

Even if this were important, which it is not, Plaintiff in Error dwells upon one phrase of a sentence used by the court, without consideration of the entire sentence or of the context. It must be remembered that the court said:

"If one person has troubles peculiar to himself as distinguished from the generality of us, that he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequence of the act resulting to the ordinary individual and in that connection you have a right to consider what the doctor said that seventy-five or eighty-five per cent have latent infirmities which might be developed as the result of an injury." Page 139 Transcript of Record.

The court was here referring to the following part of Dr. Taylor's testimony which the jury had heard, and which was as fresh in the memory of the jurors as it was in the mind of the judge:

> "Tuberculosis is a disease that happens to human beings or animals that is caused by tubercular bacilli. As to the percentage of human beings that have tubercular bacilli in their systems, I would say that that is rather a broad question. Some authorities would give you a high percentage of men who at some past date had tuberculosis and probably recovered from it. Some of us may have it now; some may have the disease actualy developed and others may have the germs lying dormant. It may be a fact that medical authorities claim that 85 per cent of the human beings have the germs lying latent in their systems, but I am not in a position to state that that is so. I don't remember having read the authorities. I have had some practical experience with tuberculosis—not a great deal."
>
> (Transcript of Record page 95).

There was no error pejudicial to Plaintiff in Error in that part of the court's charge objected to by the Fourth Assignment of Error.

REPLY TO FIFTH ASSIGNMENT OF ERROR.

As to pain and suffering as elements of damage.

In the so often referred to case of Panama R.R. Co. v. Bosse, this Court said:

> "It cannot be said with certainty that the Supreme Court of the Canal Zone was wrong in holding that, under the Civil Code, damages ought to be allowed for physical pain."
>
> Panama R.R. Co. v. Bosse, 249 W.S., 41.

It is true that in that case the court was dealing with a cause of action which arose within the Canal Zone, but do the facts in the instant case alter the legal proposition? May it be said that under the Civil Code, in civil law countries, damages cannot be allowed for physical pain? We contend that in such cases as the instant case, they can and should be allowed.

This question has been before the Circuit Court of Appeals for the Fifth Circuit in five or six cases where the Panama Railroad Company has been the Plaintiff in Error, and the same arguments and authorities now presented in the present brief for Plaintiff in Error have been repeatedly urged before that Court. It has been argued that physical pain and suffering are not elements of damage at civil law and especially under the laws of Panama and Colombia, and therefore should not be allowed within the Canal Zone. The Circuit Court of Appeals for the Fifth Circuit has had the opportunity for exhaustive study of this question, so often raised and so persistently urged by Plaintiff in Error, and finally in this cause, that Court unequivocally said:

> "*Under the law in force in Panama* and in the Canal Zone, damages for pain and suffering are recoverable in such an action as the instant one. Panama R.R. Co. v. Bosse, 239 Fed., 203, 152 C.C.A., 219."
>
> Opinion of C.C.A., Transcript of Record page 158.

Thus it may be seen that this question has been thoroughly considered by an Appellate Court wherein interpretations of the civil law are frequent, and reference to the various cases wherein this point has been raised, (Panama R.R. v. Beckford, 231 Fed., 436:

P. R.R. v. Bosse, 239 Fed. 303: P.R.R. v. Toppin, 250 Fed. 989; P.R.R. v. Curran, 256 Fed., 768; PR.R. v. Roberts, 256 Fed. 773: P.R.R. v. Piggot, 256 Fed. 837,) discloses the fact that no less than six judges of that court have had this question under consideration.

At page 33 of his brief, Plaintiff in Error invites the attention of this Court to Articles 1613 and 1614 of the Civil Code, claiming that those articles fix and limit the amount of damages which are recoverable under the Civil Code. These articles have manifestly been considered both by this Court and the Circuit Court of Appeals, because not only were they urged by Plaintiff in Error in his brief below, but they were also urged in the case of Panama R.R. Co. v. Bosse, *supra* and appear at page 62 of brief of Plaintiff in Error in that case; which brief Plaintiff in Error has made a part of his present brief and argument by reference.

But everyone at all familiar with the Civil Code, and even a lawyer unfamiliar therewith, by a cursory reading thereof, will readily see by said articles and their context, that they refer merely and solely to the measure of damages recoverable in cases of *contract*. They have nothing whatsoever to do with tort actions arising under the provisions of Art. 1341 of the Civil Code. The rule in tort is more broad, and provides generally that he who has caused an injury must make good the wrong done, and no restriction is put upon such liability to make good certain classes of damage only.

We would again call the court's attention to Dr. Concha's treatise on Colombian Criminal Law, under his heading of Civil Responsibility for crimes.

"Every violation of the penal law which causes material or *moral* damage to anyone, obliges the authors and accomplices of the offense to repair it" (Translation is ours.)

J. V. Concha, Tratado de Derecho Penal, page 114, paragraph 142.

The case of Villaveces vs. Bogota, cited at pages 34-40 of brief of Plaintiff in Error, does not show that the Courts of Colombia have any different rule as to damages than do the Courts of the United States. In the first place, that case did not deal with physical pain, suffered by the one who had received the injury, but with alleged indignities to the remains of his wife, which hurt the plaintiff's feelings. In the second place, the Court refused to allow for damages so remote, and which had not even been proved. In that respect the ruling of the Colombian Court did not show much dissimilarity to the rulings of the courts of some of our States. For example:

"The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases; but the cases are rare in which such emotion can be held an element of the damages resulting from the breach. For injury to the feelings in such case, the courts cannot give redress. Any other rule would result in intolerable litigation."

Rowell v. West U. Tel. Co. 75 Tex. 26, 12 S.W. 534.

A number of American cases follow the rule in the above case.. See note to West. U. Tel. Co. vs. Hollingsworth, 11 L.R.A. (N.S.) 497.

But in the instant case we are not dealing with re-

mote injured feelings, or worry, or anxiety, but the very present and actual physical pain suffered and still being suffered, and which the testimony shows will ever continue to be suffered in the body of the man who received the injuries.

We would invite the court's attention to the very case which is so much relied upon by Plaintiff in Error, Ramirez v. Panama R.R. Co., which indicates that *even in Colombia*, in proper cases, damages for pain and suffering may be and are considered by the courts:

> "The sum of thirty thousand pesos which Mr. Ramirez claims through his attorney, Mr. Isidoro Burgos, for damages and injuries received, *would not compensate, even in a small degree, the physical and mental sufferings of the injured party.* His misfortune is lamentable, for though it may not be permanent, as may be deduced from the prognosis of the physician, Dr. Jorge E. Delgado, *yet, there are mental sufferings, which though not tangible yet we can all appreciate,* principally when they do not affect us personally."
>
> (The italics are ours.)
>
> Transcript of Record, page 13.

Although this statement may be mere *obiter*, yet such language would not and could not be used by a Supreme Court if damages for physical pain and mental sufferings were entirely unknown to its jurisprudence. We think that the language used by the Court clearly indicates that the physical and mental pain of Mr. Ramirez, which that court says would hardly be compensated for by the payment of thirty thousand pesos, would be considered by that tribunal as an element of damages, and the only reason why judgment was not rendered against the Panama Railroad Company, as disclosed

by the decision, was that the plaintiff in the action was injured in a fight with C. Smith who "casually lent his services to the company." (Transcript of Record, page 19), and whose action in injuring the plaintiff was not done within the scope of his employment.

But the Supreme Courts of Panama and Colombia do not furnish the only authoritative constructions of the Civil Code. The same code, derived from the same source, is in force in the State of Louisiana, the Island of Porto Rico and the Canal Zone. The reports of the Courts of those jurisdictions are published in English, and are much more accessible than the reports of Colombia, and we would refer to the Courts of those jurisdictions to ascertain whether pain and suffering, under the Code Napoleon, should be considered as elements of damage.

The Supreme Court of Louisiana in Hubgh v. N. O. & Carrolton R.R. Co., 6 La. Ann. 495, stated the proposition that the Civil Code of Louisiana was derived from Spain and that "it must still be understood with the limitations affixed to it by the jurisprudence of Rome and Spain." In announcing that doctrine, the Supreme Court of Louisiana had under consideration Art. 2315 (2294) of the Civil Code of Louisiana, which we will compare with Art. 2341 of the Civil Code of Panama and of the Canal Zone:

Art. 231, Civil Code of Panama.	Art. 2315 (2294) Civil Code of Louisiana.
He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it.....	Every act whatever of man which causes damage to another obliges him by whose fault it happened to repair it.

After enunciating such a doctrine, it very pertinent to observe the limitations which the Supreme Court of Louisiana has put upon the elements of damage recoverable in cases of personal injury, under the above-quoted article.

From the hundreds of adjudicated cases on this point, from Louisiana, we will only cite two or three:

> "The jury allowed plaintiff one thousand dollars. *We fix the damages for suffering and permanent injuries* at $3,000.00, which, with the $1,799.69 of actual expenses, ,makes an aggregate of $4,799.69, for which the plaintiff is entitled to judgment." (Italics are ours.)
>
> Hanna v. N. O. Ry. Light Co., 126 La. 634,638.

> "The verdict is perhaps some what large, but we could assign no positive reason for reducing it. The injuries are of the gravest character and are permanent; and, besides, *the sufferings have been very great and plaintiff is destined to continue to suffer.*"
>
> (Italics ours.)
>
> Lee vs. Powell Bros. & Sanders Co., 126 La. 51 59.

> "According to the evidence she will hereafter require, not only some one to wait upon her constantly, but she will never be able to dispense with the services of a physician, which element considered, *and also the mental anguish and physical pain which she has endured and is to endure, we are of the opinion that, though there can be no such thing as adequate compensation, the amount awarded by the District Court should be increased.*"
>
> (Italics ours.)
>
> Egbert v. N.O. Ry. & Light Co., 128 La. 477., 486.

In Porto Rico the statute reads as follows:

> "A person who, by act or omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done."
>
> Art. 1803, (Formerly 1902) Civil Code of Porto Rico.

As early as January 14, 1903, the Hon. Wm. H. Holt who was the first United States District Judge for Porto Rico, had occasion to construe this statute to consider whether or not it offered a remedy for death by wrongful act, and held that the U.S. District Court for Porto Rico, in the interpretation of the Civil Code, would have regard for the jurisprudence of Spain and the former decisions of the Supreme Court of Spain.

> See, Teresa Borrero v. Cia. Anonyma de Luz Electrica de Ponce, 1 Porto Rico Fed. Reports, Page 144.

Let us therefore look to what the U. S. District Court for Porto Rico, interpretering and applying the law according to principles of Spanish jurisprudence, considers as the elements of damage recoverable under the article of the Code of Porto Rico which is practically identical with Art. 2341 of the Civil Code of Panama and the Canal Zone.

> "In cases of personal injury by a railroad accident, under the damage act, 1803 and 1804 of the Civil Code of Porto Rico of 1902, where there is no malice in or about the occurrence, compensatory damages are all that can be recovered, and the measure of the same is the extent of the injury done and its character, whether permanent or temporary, *the amount of suffering he endured or may have to endure during life*, if it is permanent, and the effect it has upon his earning capacity, the amount

of time lost by reason thereof, and the cost of the sickness for physician, drugs, medicines, and surgical treatment, if any." (Italics ours.)

Martinez vs. Am. Ry Co., 5 Porto Rico Fed. Rep. 311.

"In estimating damages for personal injuries, *the jury may consider pain and suffering*, medical attendance, loss of time, past, present and future, and of salary." (Italics ours.)

Wood v. Valdez, 4 Porto Rico Fed. Rep., 165.

"In estimating damages the jury may consider the extent of the injuries, expectancy of injured child's life, *suffering he may have to endure through life, physically and mentally*, and his impaired ability to earn a living." (Italics ours.)

Guzman v. Herencia, 4 Porto Rico Fed. Rep. 105 s.c. 55 L.Ed., (U.S.), 81.

It can hardly be assumed that these learned courts, working entirely in the civil law, and which have each announced that in the construction and appliction of that law they are guided by principles of Spanish jurisprudence, have for so many years been in error or have deliberately ignored and misconstrued the elements of damage under the civil law. And it will further be borne in mind that the U.S. Circuit Court of Appeals for the Fifth Circuit, a court which probably more than any other Federal Court of the Continental United States, is called upon to decide questions arising under the civil law, after having this identical point before it a number of times, said, in the instant case:

"*Under the law in force in Panama* and in the Canal Zone, damages for physical pain and suffering

are recoverable in such an action as the instant one." (Italics ours.)

Opinion of the C.C.A., Transcript of Record, page 158.

Hence, it was with reason that this court said:

"It cannot be said with certainty that the Supreme Court of the Zone was wrong in holding that under the Civil Code, damages ought to be allowed for physical pain."

Panama R.R. Co. v. Bosse, *Supra.*

There can be no doubt that according to the jurisprudence of the Canal Zone as it has been established by the Bosse case, in a cause of action arising within the Canal Zone and tried in the District Court for the Canal Zone, pain and suffering are proper elements of damage. We contend, therefore, that in the instant case, if the action was properly brought in the District Court for the Canal Zone.if that court had jurisdiction of the parties—if plaintiff had a clear right of action under the *lex loci*, then the trial court did not err in applying the law of the forum as to the elements to be considered in the measure of damages.

Citing as authority (among other cases) Slater v. Mex. R.R. Co. 194 U.S. 120, the Cyclopeadia of Law and Procedure announces the rule to be as follows:

"MEASURE OF REDRESS. The measure of redress is determined by the *lex fori*, unless the cause of action is founded upon a foreign statute which regulates the amount of recovery, for when the cause of action did not exist at common law, but is a creature of statute, a limitation upon the measure of recovery fixed by the *lex loci* is binding upon the forum."

38 Cyc. 551.

We believe this to be the correct expression of the rule and its limitations. If the law of the foreign jurisdiction which gives the right of action, or which imposes the obligation upon the tort-feasor, declares a limitation to his responsibility, a court imposing the liability will give to the tort-feasor the benefit of the limitation of responsibility. This we understand to be the doctrine of Slater v. Mex. Nat. R.R. Co. *Supra*, as reiterated by this court in Davis v. Mills, 194 U.S. 451, 48 L. ed. (U.S.) 1067.

In the case at bar the statute which imposes the obligation upon the tort-feasor to repair the damage which he has caused, does not make a rule or create a limitation that such compensation shall not be as complete as is generally understood by compensatory damages.

To hold that under Art. 2341 of the Civil Code of Panama, requiring a wrong doer to make full restitution to the injured party, a limitation is created in favor of that wrong doer absolving him from making good for the pain and suffering of the one whom he has injured, the court would have to go far afield and impose upon that article a strained interpretation opposed to the common understanding of man and most clearly opposed to the jurisprudence of the Canal Zone.

May it be said, in view of all the foregoing, that Plaintiff in Error has shown that the statute which created the right of action in the *loci deliciti* regulates the amount of recovery or creates a limit to his liability by absolving him from making compensation for the actual pain and suffering caused to the Defendant in Error by his tortuous act? If he has—if the law creating his responsibility has so limited his liability, then, under the rule of Slater v. Mex. Nat. R.R. Co. *Supra*, he is entitled, and was entitled in the trial court to the bene-

fits of that law. But if there be no such clear limitation, then, we say, that the court of the forum in deciding upon the elements of damage which he must make good, proceeded correctly in applying the *lex fori* as to the measure of damages, and committed no error.

Nor do we think that the courts will grant such a limitation of liability unless it most clearly appears from the *lex loci deliciti* that such limitation exists in the place where the tort was committed.

We do not think that the Fifth Assignment discloses any error:

First, because the Circuit Court of Appeals was entirely correct in its decision that under the law in force in Panama pain and suffering are proper elements of damage in such a case as the instant one; and, secondly, because at all events the trial court applied the *lex fori* in a matter relating solely to the remedy, in a case where a limitation had not been put upon the remedy by the foreign statute creating the right of action.

As none of the five assignments of error dislose any error in the decision of the Circuit Court of Appeals, Defendant in Error respectfully insists that the opinion and judgment of the Circuit Court of Appeals be sustained and affirmed.

Respectfully submitted,

WM. C. MACINTYRE,
W. C. TODD and
T. C. HINCKLEY,

Attorneys for Defendant in Error.

PANAMA RAILROAD COMPANY *v.* TOPPIN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 147. Argued January 16, 1920.—Decided March 15, 1920.

By the laws of Panama, a railroad company is liable for personal injuries resulting from the criminal negligence of its servant in running an engine at a rate prohibited by the Panama Police Code. P. 310.

The rule of *respondeat superior* applies in Panama, in such cases, and due care in selecting the servant is not a defense for the railroad company. P. 311.

In Panama, under Civil Code, Art. 2341, as well as in the Canal Zone, damages for physical pain are allowable in a personal injury case. P. 313. *Panama R. R. Co.* v. *Bosse*, 249 U. S. 41.

250 Fed. Rep. 989, affirmed.

THE case is stated in the opinion.

Mr. Frank Feuille and *Mr. Walter F. Van Dame*, for plaintiff in error, submitted.

Mr. Wm. C. MacIntyre, with whom *Mr. W. C. Todd* and *Mr. T. C. Hinckley* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Toppin was struck by a locomotive of the Panama Railroad Company while riding a horse in the City of Colon. He sued the company for damages in the District Court of the Canal Zone, alleging negligence, and recovered a verdict. The judgment entered thereon was affirmed by the Circuit Court of Appeals for the Fifth Circuit (250 Fed. Rep. 989), and the case is here on writ of error.

The main contentions of the company are here, as in *Panama R. R. Co.* v. *Bosse*, 249 U. S. 41, that the trial court erred in holding applicable the rule of *respondeat superior* and the rule permitting recovery for physical pain suffered. The important difference in the two cases is this: There the accident occurred in the Canal Zone; here, in the Republic of Panama. The company insists that the *Bosse Case* is not controlling, because the questions affecting liability must here be determined by the law of that Republic,—the place where the accident occurred. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120; *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473. The law

of Panama is pleaded by both parties and evidence thereon was introduced by both; but we are not limited to this evidence, as they agree that we may take judicial notice of the law of Panama existing February 26, 1904, when the Canal Treaty was proclaimed, and that, in the absence of evidence to the contrary, the law then prevailing there will be presumed to have continued in force.

First: The company contends that the jury should have been instructed that under the law of Panama the company was not liable if the accident resulted from a criminal act of its employees, there being evidence that it was due to running the locomotive at a rate of speed prohibited under penalty by the Police Code of Panama. That code, known as Ordinance No. 87 of the year 1896, provides (Articles 488, 489):

"When a tramway crosses a town, as well as when it passes by a gate or viaduct, it shall not travel at a greater speed than that of a wagon drawn by horses at a moderate trot; in case of an infraction the conductor or the administrator of the company subsidiarily shall pay a fine of 10 to 100 pesos, without prejudice to the responsibility, civil or penal, to which he may be subjected by reason of the damage, fault or tort. . . ."

"This article . . . shall be applied to railroads when they enter cities or towns."

The Panama Law, No. 62, of 1887, had provided in Article 5:

"Railroad companies are responsible for the wrongs and injuries which are caused to persons and properties by reason of the service of said railroads and which are imputable to want of care, neglect, or violation of the respective police regulations which shall be issued by the government as soon as the law is promulgated."

And Article 2341 of the Civil Code provides:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it,

without prejudice to the principal penalty which the law imposes for the fault or offense committed."

It would seem clear from a reading of these provisions that the company would not be relieved from liability in damages for injuries resulting from the negligence of its employee, merely because the negligent act was also punishable as a crime. And the Colombian authorities to which our attention has been called tend to confirm this construction.[1] There seems to have been a rule of practice under the Colombian Judicial Code (Article 1501 [2]) by which, if the civil action and the criminal action arising out of the same acts are not brought at the same time, the civil action cannot be prosecuted until the conclusion of the criminal action with the condemnation of the delinquent. But such rule obviously can have no application here; among other reasons because it refers to the case where the same person is liable both civilly and criminally. Here it is the engineer who is liable criminally under the Police Code and the company against whom civil liability is being enforced.

Second: The company contends that by the law of Panama it cannot be held liable for the injury caused by the negligence of its engineer if it was careful in selecting him, because the law of Panama does not recognize liability without fault. This contention was made and rejected by the Supreme Court of Colombia in a case similar to the case at bar.[3] There suit was brought against the empresario of a railway to recover for the loss of a house by fire due to the negligent operation of a locomotive.

---

[1] *Cecilia Jaramillo de Cancino* v. *Railroad of the North.* Supreme Court of Justice of the Republic of Colombia, XIII Judicial Gazette, Nos. 652-653. Decided December 16, 1897.

[2] *Ruperto Restrepo* v. *Sabana Railway Company.* Supreme Court of Justice of the Republic of Colombia, III Judicial Gazette, No. 353, pp. 332-334. Decided July 19, 1892.

[3] *Cancino* v. *Railroad of the North, supra,* note 1.

The court rested the liability upon Article 2347 of the Civil Code,[1] declaring that all doubt as to the existence of the necessary dependency was removed by Article 5 of Law 62 of 1887, which "without in any way mentioning the dependents, employees, or workmen of railway enterprises, makes their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the service of the said roads." The court continues: "and there is not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employees not being sufficient in the opinion of the court, because the diligence and care here treated of, is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen." [2] This case seems to overrule in effect the principal authority to which the plaintiff in error has referred us [3]—in fact, it is not unlikely that such was the object of Article 5 of Law 62 of 1887.

[1] Article 2347. "Every person is responsible not only for his own actions, for the purpose of making good the damage, but for the act of those who may be under his care.

"Thus, the father, and failing him the mother, is responsible for the act of the minor children who live in the same house.

"Thus, the tutor or guardian is responsible for the conduct of the pupil who lives under his protection and care.

"Thus, the husband is responsible for the conduct of his wife.

"Thus, the directors of colleges and schools respond for the acts of students while they are under their care, and artisans and empresarios for the acts of their apprentices and dependents in like cases.

"But this responsibility will cease if with the exercise of the authority and care which their respective characters prescribe for and confer on them they could not prevent the act."

[2] See also *Panama R. R. Co.* v. *Bosse*, 249 U. S. 41, 49.

[3] *Ramires* v. *Panama Railroad Company*. Supreme Court of Justice of Colombia, 1 Gaceta Judicial, No. 22, p. 170 (June 10, 1887).

308. Syllabus.

Third: The contention that the lower courts erred in allowing recovery for physical pain was made and overruled in *Panama R. R. Co.* v. *Bosse, supra*, p. 47. As the decision there rested upon Article 2341 of the Civil Code of Panama it is applicable whether the *lex loci* or the *lex fori* should be held controlling as to such damages. Exception was also taken to the ruling that "if the plaintiff has developed tuberculosis of the spine as a result of the injuries received" the tuberculosis may be considered as an element of damages. The instruction was given with such explanations as to have been clearly unobjectionable.

Affirmed.